CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 31 JULY 30, 1997 NO. 31

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

Please visit the U.S. Customs Web at:
http://www.customs.ustreas.gov

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 6–1997)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names with the U.S. Customs Service during the month of June 1997 follow. The last notice was published in the CUSTOMS BULLETIN on June 25, 1997.

Correction or information to update files may be sent to U.S. Customs Service, IPR Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482–6960.

Dated: July 11, 1997.

KARL MEANS,
Acting Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

U.S. CUSTOMS SERVICE
IPR RECORDATIONS ADDED IN JULY 1997

PAGE 1
DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9700120	19970603	20170603	SX-200X SOFTWARE GENERIC LIGHTWARE	MITEL CORPORATION	N
COP9700121	19970603	20170603	SX-50 PBX SOFTWARE GENERIC M555	MITEL CORPORATION	N
COP9700122	19970603	20170603	THE SUN SHINES FOR LIVING, PART 1	WILLIAM JOSEPH CHOPAK	N
COP9700123	19970603	20170603	SUN CHANG DESIGN PMS-929	SUN CHANG U.S.A. INC.	N
COP9700124	19970603	20170603	BIG YANK THERMAL WOOL SOCKS (BAGS)	GARMENTEX INTERNATIONAL	N
COP9700125	19970603	20170603	BIG YANK BOY'S SOCKS (BAGS) (2 VERSIONS)	GARMENTEX INTERNATIONAL	N
COP9700126	19970603	20170603	BIG YANK BOXER SHORTS	GARMENTEX INTERNATIONAL	N
COP9700127	19970603	20170603	BIG YANK MEN'S BRIEFS	GARMENTEX INTERNATIONAL	N
COP9700128	19970603	20170603	BIG YANK CLASSIC SOCKS	GARMENTEX INTERNATIONAL	N
COP9700129	19970603	20170603	BIG YANK THERMAL UNDERSHIRT	GARMENTEX INTERNATIONAL	N
COP9700130	19970603	20170603	BIG YANK COTTON UNDERSHIRTS	GARMENTEX INTERNATIONAL	N
COP9700131	19970603	20170603	BIG YANK SOCKS (6 VERSIONS)	GARMENTEX INTERNATIONAL	N
COP9700132	19970617	20170617	YOUNGS NOAHS ARK #30117	YOUNGS, INC.	N
COP9700133	19970620	20170620	POWER SABER	S.R. MICKLEBERG COMPANY INC.	N
COP9700134	19970620	20170620	SPOON/FORK/KNIFE IV	JDI GROUP INC.	N
COP9700135	19970620	20170620	CHATEAU RAYMOND-LAFON	FRENCH PRESTIGE WINES INC.	N
COP9700136	19970620	20170620	9502 SUPER RACER & (9086 SUPER RACER)	SILVERLIT TOYS MANUFACTURY LTD.	N
COP9700137	19970620	20170620	9504 RABBIT BUG & (9088 RABBIT BUG)	SILVERLIT TOYS MANUFACTURY LTD.	N
COP9700138	19970620	20170620	9501 SUPER FIGHTER & (9035 SUPER FIGHTER)	SILVERLIT TOYS MANUFACTURY LTD.	N
COP9700139	19970620	20170620	9503 SUPER RACER & (9087 SUPER RACER)	SILVERLIT TOYS MANUFACTORY LTD.	N
COP9700140	19970624	20050624	ALOHA HAWAII LEI, LUAU #7	TRADE WEST, INC.	N
COP9700141	19970624	20060624	ALOHA HAWAII LEI, HIBISCUS #50	TRADE WEST, INC.	N
COP9700142	19970624	20020624	ALOHA HAWAII LEI, BOUGANVILLEA POEPOE #2031/38/44031	TRADE WEST, INC.	N
COP9700143	19970624	20020624	ALOHA HAWAII LEI, SHELL GINGER POEPOE #12680/44680	TRADE WEST, INC.	N
COP9700144	19970625	20160625	PRIYA	USHODAYA ENTERPRISES, LIMITED	N
COP9700145	19970625	20160625	SPOON/FORK/KNIFE I	JDI GROUP, INC.	N
COP9700146	19970625	20160625	SPOON/FORK/KNIFE II	JDI GROUP, INC.	N
COP9700147	19970625	20160625	SPOON/FORK/KNIFE III	JDI GROUP, INC.	N
COP9700148	19970627	20170627	THE LOST WORLD	UNIVERSAL CITY STUDIOS, INC.	N
SUBTOTAL RECORDATION TYPE			29		
TMK9700394	19970603	20060128	RENUZIT	DIAL CORPORATION	N
TMK9700395	19970603	20060217	ORREFORS SWEDEN AND DESIGN	ORREFORS KOSTA BODA AKTIEBOLAG	N
TMK9700396	19970603	20061217	CK CALVIN KLEIN	CALVIN KLEIN TRADEMARK TRUST	N
TMK9700397	19970603	20070311	CK CALVIN KLEIN	CALVIN KLEIN TRADEMARK TRUST	N
TMK9700398	19970603	20070121	KNOTHEAD	GEORGE M. BORKOVIC	N
TMK9700399	19970603	20061231	CONFIGURATION OF A KNEE PAD	BARWALT INC.	N
TMK9700400	19970603	20060508	WAGNER	COOPER INDUSTRIES INC.	N
TMK9700401	19970603	20030601	ESP EXTRA SENSORY PERFECTION	ROBERT J. WILLIAMS JR.	Y
TMK9700402	19970603	20030525	INFERNO	ROBERT J. WILLIAMS JR.	Y
TMK9700403	19970604	20070318	LAUREN RALPH LAUREN	POLO RALPH LAUREN L.P.	N
TMK9700404	19970617	20060617	INDIAN EARTH	INDIAN EARTH COSMETICS, INC.	N
TMK9700405	19970617	20070225	BELLA DI CERIGNOLA	BIOCONSERVE S.R.L.	N
TMK9700406	19970617	20070616	BEVERLY HILLS POLO CLUB AND DESIGN	BHPC MARKETING, INC.	N
TMK9700407	19970617	20060102	LUGZ STYLIZED AND DESIGN	JACK SCHWARTZ SHOES, INC.	N
TMK9700408	19970617	20040308	BLUE WAVE STYLIZED AND DESIGN	PREMIER INTERNATIONAL (U.S.A.)	Y
TMK9700409	19970617	20021020	ROZA	PREMIER INTERNATIONAL (U.S.A.)	Y
TMK9700410	19970617	20060116	MISCELLANEOUS DESIGN	CALLAWAY GOLF COMPANY	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9700411	19970619	20060521	GINGHAM	BATH & BODY WORKS, INC.	N
TMK9700412	19970620	20080802	DIESEL	DIESEL S.P.A.	N
TMK9700413	19970620	20091107	DIESEL	DIESEL S.P.A.	N
TMK9700414	19970620	20000710	THE BRAVE-DIESEL & DESIGN	DIESEL S.P.A.	N
TMK9700415	19970620	20060702	955 KIDS	MERCANTILE STORES COMPANY INC.	Y
TMK9700416	19970620	20051003	955 ORIGINALS	MERCANTILE STORES COMPANY INC.	Y
TMK9700417	19970620	20061231	955 ORIGINALS	MERCANTILE STORES COMPANY INC.	Y
TMK9700418	19970620	20021117	955 ORIGINALS	MERCANTILE STORES COMPANY INC.	Y
TMK9700419	19970623	20040719	KAMAYAN	TOWN FIESTA TRADING INC.	Y
TMK9700420	19970623	20070513	CH AND DESIGN	CAROLINA HERRERA LTD.	Y
TMK9700421	19970623	20070128	CONFIGURATION OF A DESIGN OF A MIXER	MACKIE DESIGN INC.	N
TMK9700422	19970623	20070311	BELLA COLLINA	ADVANTAGE INTERNATIONAL FOODS	Y
TMK9700423	19970623	20040626	PETERBILT AND DESIGN	PACCA INC.	N
TMK9700424	19970623	20040117	PRADA	PREFEL S.A.	N
TMK9700425	19970623	20050117	PRADA & TRIANGLE DESIGN	PREFEL S.A.	N
TMK9700426	19970623	20041227	PRADA & DESIGN	PREFEL S.A.	N
TMK9700427	19970623	20070204	BLUEPRINTS	UNITED STATES SHOE CORPORATION	N
TMK9700428	19970623	20070211	QUAD/TECH INTERNATIONAL	QUAD-TECH INC.	N
TMK9700429	19970624	20030116	NORTHWESTERN	NORTHWESTERN GOLF COMPANY	N
TMK9700430	19970624	20060409	ETIENNE AIGNER DEVICE	ETIENNE AIGNER, INC.	N
TMK9700431	19970624	20060604	ETIENNE AIGNER	ETIENNE AIGNER, INC.	Y
TMK9700432	19970624	20031221	ETIENNE AIGNER	ETIENNE AIGNER, INC.	N
TMK9700433	19970624	20020605	ETIENNE AIGNER DEVICE	ETIENNE AIGNER, INC.	Y
TMK9700434	19970624	20010608	ETIENNE AIGNER	ETIENNE AIGNER, INC.	Y
TMK9700435	19970624	20050117	ETIENNE AIGNER DEVICE	ETIENNE AIGNER, INC.	Y
TMK9700436	19970624	20060123	ETIENNE AIGNER DEVICE	ETIENNE AIGNER, INC.	Y
TMK9700437	19970624	20010815	ETIENNE AIGNER LABEL	ETIENNE AIGNER, INC.	Y
TMK9700438	19970624	20000403	ETIENNE AIGNER	ETIENNE AIGNER, INC.	N
TMK9700439	19970624	20060528	HORSESHOE DEVICE	ETIENNE AIGNER, INC.	Y
TMK9700440	19970624	20000626	ORIGINAL ETIENNE AIGNER WITH DEVICE	ETIENNE AIGNER, INC.	Y
TMK9700441	19970624	20060604	ETIENNE AIGNER AND DEVICE	ETIENNE AIGNER, INC.	Y
TMK9700442	19970624	20060903	ETIENNE AIGNER AND DEVICE	ETIENNE AIGNER, INC.	N
TMK9700443	19970624	20050302	HORSESHOE DEVICE	ETIENNE AIGNER, INC.	Y
TMK9700444	19970624	20081011	ETIENNE AIGNER IN SCRIPT	ETIENNE AIGNER, INC.	Y
TMK9700445	19970624	20081011	ETIENNE AIGNER	ETIENNE AIGNER, INC.	Y
TMK9700446	19970624	20030203	HORSESHOE DEVICE	ETIENNE AIGNER, INC.	Y
TMK9700447	19970624	20020821	HORSESHOE DEVICE	ETIENNE AIGNER, INC.	Y
TMK9700448	19970624	20061028	DEBOSSED LINE DESIGN	CHAS. CHAPMAN CO., LTD., THE	N
TMK9700449	19970624	20061007	FOR JOSEPH	GOODS MANUFACTURED WITH CARE, IN	N
TMK9700450	19970625	20060305	NUT QUACKERS	NUT QUACKERS USA INC.	Y
TMK9700451	19970625	20060312	NUT QUACKERS & DESIGN	NUT QUACKERS USA INC.	Y
TMK9700452	19970625	20060130	BONICELL & DESIGN	BONICELL U.S.A. CORP.	N
TMK9700453	19970626	20020319	SHIMMERS	BIC CORPORATION	N
TMK9700454	19970626	20050926	WAVELENGTHS	BIC CORPORATION	N
TMK9700455	19970626	20040405	JURASSIC PARK AND DESIGN	UNIVERSAL CITY STUDIOS, INC.	N
TMK9700456	19970627	20040510	JURASSIC PARK	UNIVERSAL CITY STUDIOS, INC.	N
TMK9700457	19970627	20050321	JP STYLIZED AND DINOSAUR DESIGN	UNIVERSAL CITY STUDIOS, INC.	N
TMK9700458	19970627	20050606	JURASSIC PARK AND DESIGN	UNIVERSAL CITY STUDIOS, INC.	N

APPLICATION FOR RECORDATION OF TRADE NAME: "IBBI"

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "IBBI," used by International Business to Business, Inc., a corporation organized under the laws of the State of Colorado located at 566 #D Nucla Way, Aurora, Colorado 80011.

The application states that the trade name is used in connection with an item known as a key safe or lock and lockbox which has a compartment in which keys are locked and a shackle to attach to a door or doorknob.

The merchandise is manufactured in the Taiwan.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before September 22, 1997.

ADDRESS: Written comments should be addressed to U.S. Customs Service, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Gina D'Onofrio, Intellectual Property Rights Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229 (202–482–6960).

Dated: July 15, 1997.

KARL WM. MEANS,
Acting Chief,
Intellectual Property Rights Branch.

[Published in the Federal Register, July 22, 1997 (62 FR 39302)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, July 15, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

PATRICIA TODARO,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A CERTAIN FOOD PRODUCT, "RANCH SEASONING"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke New York Ruling Letter (NYRL) 878986, dated December 1, 1992, concerning the classification of a product known as "Ranch Seasoning".

DATE: Comments must be received on or before August 29, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Tariff Classification Appeals Division, 1301 Constitution Avenue, N.W. (Franklin Court Building), Washington, D.C. 20229. Comments submitted may be inspected at the Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Norman W. King, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7097.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended be section 623 of Title VI (Customs Modernization) of the

North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a product known as "Ranch Seasoning".

NYRL 878986, dated December 1, 1992, held that the "Ranch Seasoning" was classified in subheading 1901.90.80, Harmonized Tariff Schedule of the United States (HTSUS) (1992), which provided for other food preparations of goods of headings 0401 to 0404, not elsewhere specified or included. Customs intends to revoke NYRL 878986, Attachment A to this document, to reflect the proper classification in subheading 2103.90.30, HTSUS (1997).

Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter 960688, revoking NYRL 878986 and classifying the product in subheading 2103.90.80, HTSUS, is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 14, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, December 1, 1992.

CLA19:S:N:N1:228
Category: Classification
Tariff No. 1901.90.8040

MR. PHILLIP J. CHRISTIE, SR.
3213 O Street, NW
Washington, DC, 20007

Re: The tariff classification of a food flavoring from New Zealand.

DEAR MR. CHRISTIE:

In your letters dated August 17, 1992 and September 21, 1992, on behalf of McCormick & Company, you requested a tariff classification ruling.

A sample was submitted with your first letter, and an ingredients breakdown was provided with your September correspondence. The product, called "ranch seasoning," is a powder said to be composed of 83 percent dry buttermilk, 15 percent salt, 1.5 percent garlic powder, and .5 percent onion powder. Analysis found the sample contained 3.75 percent butterfat. The merchandise will be imported in 50-pound multi-walled bags or 200 to 250-pound poly-lined fiber board drums, and sold to snack food companies for use as a flavoring ingredient in potato chips, crackers, and other salty snacks.

The applicable subheading for this product will be 1901.90.8040, Harmonized Tariff Schedule of the United States (HTS), which provides for food preparations of goods of headings 0401 to 0404 * * * not elsewhere specified or included * * * other * * * subject to quotas established pursuant to section 22 of the Agricultural Adjustment Act, as amended * * * provided for in subheading 9904.10.75. The rate of duty will be 10 percent *ad valorem*. At this time, there is no quota allocation under subheading 9904.10.75, HTS. The merchandise will, therefore, not be permitted to enter the commerce of the United States.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:TC:FC 960688K
Category: Classification
Tariff No. 2103.90.80

MR. PHILLIP J. CHRISTIE, SR.
3213 O Street, N.W.
Washington, DC 20007

Re: Revocation of New York Ruling Letter (NYRL) 878986, Dated December 1, 1992; "Ranch Seasoning".

DEAR SIR:

In response to your requests of August 17, and September 21, 1992, on behalf of McCormick & Co., Customs issued NYRL 878986, dated December 1, 1992. The ruling held that a product known as "Ranch Dressing" was classified in subheading 1901.90.80, Harmonized Tariff Schedule of the United States (1992), which provided for other food preparations of goods of headings 0401 to 0404, not elsewhere specified or included. NYRL 878986 no longer reflects the views of the Customs Service. The following represents our position.

Facts:

The product called "Ranch Seasoning" from New Zealand was described in NYRL 878986 as a powder composed of 83 percent dry buttermilk, 15 percent salt, 1.5 percent garlic powder, .5 percent onion powder and found to contain 3.75 percent butterfat. The product was used as a flavoring ingredient in potato chips, crackers, and other salty snacks.

Issue:

The issue is whether the product composed of 83 percent milk powder is more appropriately described as a food preparation of milk (i.e., a good of heading 0401 to 0404) in heading 1901, or, as a seasoning in heading 2103, HTSUS.

Law and Analysis:

Heading 1901, HTSUS, provides, in part, for food preparations of goods of headings 0401 to 0404, not containing cocoa or containing less than 5 percent by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included. Headings 0401 to 0404 are milk provisions. Heading 1901 is a food preparation provision, which includes, in part, food preparations which derives its essential character from the milk ingredient.

Heading 2103, HTSUS, provides, in part, for food preparations consisting of mixed condiments and mixed seasonings. Heading 2103 does not require the presence of any one specif-

ic ingredient (such as milk). Also, heading 2103 is not qualified by the phrase "not elsewhere specified or included" as is heading 1901. Heading 2103 is a use provision. Additional U.S. Rules of Interpretation, 1(a), HTSUS, states that

> 1. In the absence of special language or context which otherwise requires—
>
> (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United states at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

In our opinion, the salt (15 percent), garlic (1.5 percent) and onion powder (.5 percent) significantly affect the organoleptic properties of the blend of "Ranch Seasoning" and the product belongs to a class or kind of goods composed of a variety of ingredients, principally used to flavor human foods during their preparation, i.e., a seasoning. The merchandise is classified in subheading 2103.90.80, HTSUS (1997), with duty at the general rate of 7 percent *ad valorem*.

Holding:

The product known as "Ranch Seasoning", as described above, is classified as other mixed condiments and seasonings, in subheading 2103.90.80, HTSUS (1997), with a general duty rate of 7 percent *ad valorem*.

NYRL 878986 is revoked.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO A VOICE RECORDER AND A TALKING BOOKMARK

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a voice recorder and a talking bookmark.

DATE: Comments must be received on or before August 29, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Arnold L. Sarasky, Food and Chemicals Classification Branch, (202) 482–7020.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a voice recorder and a talking bookmark.

New York Ruling Letter (NYRL) A85077, issued July 5, 1996, by the Director, National Commodity Specialist Division, New York, NY, held that a voice recorder was classifiable in subheading 8520.90.0080, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which generally provides for magnetic recorders and other sound recording apparatus. That ruling held that the talking bookmark was classifiable in subheading 8543.89.9090, HTSUSA, which generally provides for electrical machines and apparatus. A copy of the above ruling is set forth in Attachment A to this document.

Customs Headquarters is of the opinion that that ruling is incorrect insofar as it misquotes the narrative of the first noted subheading and that it incorrectly classifies the last noted article. We propose to modify NYRL A85077 to correct those deficiencies. We proposed to correct the quoted narrative of the subheading under which the voice recorder was classified without changing that classification. We further propose to classify the bookmark under subheading 3926.10.0000, HTSUSA, the provision for office or school supplies of plastics.

Before taking this action, consideration will be given to any written comments timely received. The proposed ruling modifying NYRL A85077 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring or after the date of publication of this notice.

Dated: July 14, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, July 5, 1996.

CLA–2–85:RR:NC:108:A85077
Category: Classification
Tariff Nos. 8520.90.0080 and 8543.89.9090

MS. VIENNA H. DOWNES
MICRO GAMES OF AMERICA
16730 Schoenborn Street
North Hills, CA 91343–6122

Re: The tariff classification of merchandise from Hong Kong.

DEAR MS. DOWNES:

In your letter dated June 20, 1996 you requested a tariff classification ruling.

The sample submitted, item number MGA–2300, is a four and one half inch round shaped sound recording device. Its features consist of remote recording and reproducing of sounds, a speaker, reset button, mic, and is powered by three AA batteries.

The sample submitted, item number GB–875, is a plastic bookmark which plays back pre-recorded sounds. This item is powered by two G13 batteries.

The applicable subheading for item MGA–2300 will be 8520.90.0080, Harmonized Tariff Schedule of the United States (HTS), which provides for magnetic tape recorders and other sound recording apparatus, whether or not incorporating a sound reproducing device: other magnetic tape recorders incorporating sound reproducing apparatus: other; other. The rate of duty will be 2.3 percent *ad valorem*.

The applicable subheading for item, GB–875, will be 8543.99.9090, Harmonized Tariff Schedule of the United States (HTS), which provides for electrical machines and apparatus, having individual functions, not specified or included in this chapter; parts thereof: other machines and apparatus: other: other: other: other; other. The rate of duty will be 3.4 percent *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Phil Carabetta at 212–466–5672.

PAUL SCHWARTZ,
(for Roger J. Silvestri, Director,
National Commodity Specialist Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:FC 959981 ALS
Category: Classification
Tariff No. 3926.10.0000 and 8520.90.0000

MS. VIENNA H. DOWNES
MICRO GAMES OF AMERICA
16730 Schoenborn Street
North Hills, CA 91346–6122

Re: Reconsideration of New York Ruling Letter (NYRL) A80577, dated July 5, 1996.

DEAR MS. DOWNES:

This is in reference to your request of August 27, 1996, concerning 2 articles, a voice recorder and a "talking" bookmark. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C.

1625), as amended by 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), we propose to modify that ruling.

Facts:

The "Hide and Speak" voice recorder (article MGA–2300), is a 4 and ½ inch round shaped sound recording device. It is designed to be operated as a 'remote control' voice recording by allowing the user to activate its recording mechanism from up to 30 feet away. The article can record a 6 second message on an electronic microcircuit for playback and is battery powered.

The "Goosebumps Talking Bookmark" (article GB–875), consists of a plastic bookmark with a 3 dimension 'monster' face motif attached to an audio playback unit which sticks out from the pages of a book when the item is used as a bookmark. Two light sensitive plastic tabs extend from the above unit and slide over the page to mark the book reader's location. When the book is opened and these tabs are exposed, the light causes one of three electronically prerecorded 'scary' remarks to be played back. This article is battery powered.

Issue:

Are these articles classifiable as toys?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's) taken in order. GRI 1 provides that the classification is determined first in accordance with the terms of the headings and any relative section and chapter notes. If GRI 1 fails to classify the goods and if the headings and legal notes do not otherwise require, the remaining GRI's are applied, taken in order.

In the request for reconsideration, the importer argues that the subject articles should be classified as toys in heading 9503, HTSUSA. It is noted that the "Hide and Speak" recorder contains only 6 seconds of recording capability. It is stated to compare to an item referred to as a "Talking R2D2 Robot" which was held to be classifiable as a toy (New York Ruling Letter A85383, dated July 1, 1996). It is stated that the recorder and the "Goosebumps Talking Bookmark" are marketed as toys in toy stores

In regard to the recording device and its comparison to the robot, we note that the robot was shaped in the configuration of a robot creature. It was classified in a provision covering toys representing animals or non-human creature (for example, robots and monsters) and parts and accessories thereof: other, toys not having a spring mechanism. The instant recording device is not a representation of a robot, etc. Therefore, the above ruling is not governing in the classification of the instant article. The recorder, although marketed to children, is similar to other hand-held sound recording/reproducing devices marketed to the public which provide limited recording capability and quality of sound which have been found to be classifiable as a sound recording/reproducing apparatus Headquarters Ruling Letter (HRL) 958302, dated October 17, 1995. The environment of sale, advertisement and display, while one factor to consider, is not dispositive of the appropriate classification of an item.

We note that the Explanatory Notes (EN) to the Harmonized System, which represent the views of the international classification experts, in EN 85.20 relative to sound recording devices, specifies that "* * * heading covers all sound recording apparatus, whatever the purpose for which it is intended * * * [and] includes sound recording apparatus, incorporating a sound reproducing device,"

We next considered the "Goosebumps Talking Bookmark" for which classification in heading 9503 as a toy has been suggested. The importer notes that the article, when exposed to light, by the opening of a book, repeats One of 3 prerecorded short phrases and that the item is packaged and sold as a toy in toy stores. In examining the article we note that its primary function is to serve as a bookmark and that it serves such function at all times. This is the case whether or not the electronic component thereof is operational. It serves that purpose when the book is closed or when the battery no longer supplies power.

While EN 85.43 (13) states that heading 8543 includes electronic music modules, to which the instant sound devices are akin, we note that EN 92.08, also mentions musical mechanism. It states that articles which incorporate a musical mechanism but which are essentially utilitarian or ornamental in function (for example, clocks, miniature wooden furniture, glass vases containing artificial flowers, ceramic figurines) are not regarded as

musical boxes within the meaning of this heading. These articles are classified in the same headings as the corresponding articles not incorporating a musical mechanism. Also, articles such as wrist watches, cups and greeting cards containing electronic musical modules are not regarded as goods of this heading. Such articles are classified in the same headings as the corresponding articles not incorporating such modules. In Headquarters Rulings Letter (HRL) 950236, dated June 29, 1992, in connection with the classification of talking door mats, we concluded that the international classification experts intended that the presence of a musical or sound producing device should not control the classification of articles that would normally be classified elsewhere. Further, in connection with the classification of a children's talking storybook and musical greeting card, we noted that the printed paper was indispensable to the functioning of the product and that the integrated circuit, while adding an additional feature to the article, is nevertheless secondary to its functioning and should not control its classification, (HRL 081831, dated May 17, 1989 and HRL 086838, dated July 3, 1990). Numerous Headquarters rulings subsequently issued have reached the same conclusion.

Accordingly, we believe that the bookmark would be classifiable under the provisions for articles of plastic. In this regard, we consulted EN 39.26 which covers Other Articles of Plastics * * *." We noted that "book-marks" is one of the exemplars specifically noted in item (5) thereunder.

Holding:

Hand-held sound recording/reproducing devices with limited recording capability and quality of sound are classifiable in subheading 8520.90.0080, HTSUSA, which provides for magnetic tape records and other sound recording apparatus, whether or not incorporating a sound reproducing device: Other; Other. Such articles are subject to a general rate of duty of 1.6 percent *ad valorem*.

Bookmarks of plastic which play back pre-recorded sounds when exposed to light classifiable in 3926.10.0000, HTSUSA, which provides for Other articles of plastics and articles of other materials of heading 3901 to 3914: Office or school supplies. Articles so classified are subject to general rate of duty of 5.3 percent *ad valorem*.

NYRL A85077 is modified, as set forth above.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED MODIFICATION OF A RULING LETTER REGARDING THE TARIFF CLASSIFICATION OF A TOOL ROLL-UP ORGANIZER

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a tool roll-up organizer.

DATE: Comments must be received on or before August 29, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings,

Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, NW (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Hollaway, Tariff Classification Appeals Division (202) 482–6996.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Aggrement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of a tool roll-up organizer.

In New York Ruling Letter (NY) 887383, dated June 22, 1993, Customs incorrectly classified a tool roll-up organizer under subheading 6307.90.9986 of the Harmonized Tariff Schedule of the United States Annotated (other made-up textile articles). NY 887383 is set forth as "Attachment A" to this document. The tool roll-up organizer is correctly classified under subheading 4202.92.9025, HTSUSA (tool bags and similar containers with an outer surface of man-made. fibers). Before taking this action, we will give consideration to any written comments timely received. Proposed HQ 960245 revoking NY 887383 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.0), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 14, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, June 22, 1993.

CLA–2–63:S:N:N6:345 887383
Category: Classification
Tariff No. 6307.90.9986

MR. SAMUEL ZEKSER
SOBEL SHIPPING CO., INC.
170 Broadway, Suite 1501
New York, NY 10038

Re: The tariff classification of a "Tool Roll-Up Organizer from Taiwan and China.

DEAR MR. ZEKSER:

In your letter dated June 16, 1993, on behalf of B & K Industries Inc., Wood Dale, Illinois, you requested a tariff classification ruling.

The sample submitted is a "Tool Roll-Up Organizer" made of 600 denier polyester woven fabric that is coated on one side with PVC. In unfolded condition, it measures approximately 25 3/16 inches long by 21 inches wide, It features thirty opened pockets. Inserted at the top of the article are two metal rings. Attached to the lower right side are two web straps with strips similar to the VELCRO brand loop fastener and a D-ring.

In addition you inquired about textile visa and quota. At the present time this merchandise is not subject to any visa or quota requirements.

The applicable subheading for the "Tool Roll-Up Organizer" will be 6307.90.9986, Harmonized Tariff Schedule of the United States (HTS), which provides, for other made up articles * * * Other: Other, other. The rate of duty will be 7 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC::TE 960245
Category: Classification
Tariff No. 4202.92.9025

MR. SAMUEL ZEKSER
SOBEL SHIPPING CO., INC.
170 Broadway, Suite 1501
New York, NY 10038

Re: Modification of NY 887383; Tool Roll-Up Organizer; heading 4202; heading 6307; *Totes v. United States*, 69 F. 3d 495; tool boxes; tool cases; tool rolls.

DEAR MR. ZEKSER:

On June 22, 1993, Customs issued New York Ruling Letter (NY) 887383 to your company, on behalf of B & K Industries Inc., regarding the tariff classification of a "Tool Roll-Up Organizer." We enclose a copy of that ruling for your convenience.

We have reviewed NY 887383 and determined that the classification of the tool roll-up organizer was incorrect. Our reasons are set forth below.

Facts:

In NY 887383, Customs classified a tool roll-up organizer under subheading 6307.90.9986 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as an "other made-up article."

The tool roll-up organizer was described in NY 887383 as follows:

> The sample submitted is a tool roil-up organizer made of 600 denier polyester woven fabric that is coated on one side with PVC. In unfolded condition, it measures approximately 25 3/16 inches long by 21 inches wide. It features thirty opened pockets. Inserted at the top of the article are two metal rings. Attached to the lower right side are two web straps with strips similar to the VELCRO brand loop fastener and a D-ring.

Issue:

Whether the tool roll-up organizer is classifiable under heading 4202, HTSUSA, as tool bags or similar containers, or under heading 6307, HTSUSA, as other made-up textile articles?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification is determined first in accordance with the terms of the headings of the tariff and any relative section or chapter notes. Where goods cannot be classified on the basis of GRI 1, the remaining GRI will be applied in order.

Heading 4202, HTSUSA, provides for:

> Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper. (Emphasis added).

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System constitute the official interpretation of the nomenclature at the international level. While not legally binding, they do represent the considered views of classification experts of the Harmonized System Committee. It has, therefore, been the practice of the Customs Service to follow, whenever possible, the terms of the EN when interpreting the HTSUSA.

On July 1, 1992, the Harmonized System Committee issued a revision to the EN for heading 4202. This revision provides at page 661 that heading 4202 does not cover:

> (f) Tool boxes or cases [in the first part of the heading], not specially shaped or internally fitted to contain particular tools with or without their accessories (generally, heading 39.36 or 73.26). (Emphasis in original).

The EN also state that the expression "similar containers" in the second part of the heading (after the semicolon) includes, among other things, "tool and jewellery rolls." Unlike tool boxes and tool cases, there is no requirement in the EN that tool rolls be specially shaped or internally fitted to contain particular tools.

In the instant case, the tool roll up organizer is "*ejusdem generis*" or "of the same kind" of merchandise as tool bags listed in heading 4202, and/or tool rolls referred to in the EN.

In the case of *Totes v. United States*, 69 F.3d 495 (1995), the court addressed the principle of *ejusdem generis* in determining whether a trunk organizer was a "similar container" under heading 4202. The court stated:

> Under the rule of *ejusdem generis*, which means "of the same kind," where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified. As applicable to classification cases, *ejusdem generis* requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* [by name] in order to be classified under the general terms.

The tool roll-up organizer is a container similar to tool bags and/or tool rolls in that it possesses the essential characteristics or purposes of those articles, i.e., to organize, store and protect tools. It is, therefore, classifiable under heading 4202, HTSUSA.

Holding:

The tool roll-up organizer is classifiable under subheading 4202.92.9025, HTSUSA, which provides for, among other things, tool bags and similar containers with an outer sur-

face of man made fibers. It is dutiable at the general column rate of 19.3 percent *ad valorem* and falls within textile category 670.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories you should contact your local Customs office prior to importing the merchandise to determine the current applicability of any import restraints or requirements.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED MODIFICATION OF A RULING LETTER INVOLVING THE MARKING OR MUTILATION OF IMPORTED SHIRTS TO BE USED AS SAMPLES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of past ruling letter; solicitation of comments.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2186 (1993)), this notice advises interested parties that Customs intends to modify a ruling pertaining to the manner in which sample shirts entered duty-free under subheading 9811.00.60, Harmonized Tariff Schedule of the United States, may be marked or mutilated to ensure that they are unsuitable for use other than as samples.

DATES: Comments must be received on or before August 29, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to the U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, Franklin Court, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., NW, Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Keith B. Rudich, Special Classification and Marking Branch, (202) 482–6980.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2186 (1993)), this notice advises interested parties that Customs intends to modify a ruling pertaining to the manner in which imported shirt samples may he marked or mutilated so as to be eligible for duty-free treatment under subheading 9811.00.60, Harmonized Tariff Schedule of the United States ("HTSUS").

Subheading 9811.00,60, HTSUS, provides for the duty-free entry of samples to be used only to solicit orders for products of foreign countries, provided they are valued not over $1 each, or are marked, torn, perforated or otherwise treated so as to render them unsuitable for sale or for use otherwise than as samples.

Guidelines regarding the manner in which imported textile samples should be marked or mutilated so as to render them eligible for duty-free treatment under subheading 9811.00.60, HTSUS, are set forth in Interim Update to Customs Directive 3500–07, Textile Sample Guidelines, dated January 4, 1989. These guidelines also set forth more lenient methods for marking imported commercial samples which are not entered duty-free under subheading 9811.00.60, HTSUS. The articles for which the more lenient methods would be preferred include articles to be imported for photographing, modeling and other similar uses, and for which mutilation or the stamping of the word "SAMPLE" would render the article unsuitable for use as a trade sample.

Headquarters Ruling Letter (HRL) 559452 dated February 5, 1996 (Attachment A to this document), concerned whether a sewn-in label may be used or if marking with an indelible ink pen must be used to designate certain imported shirts as samples eligible for duty-free treatment under subheading 9811.00.60, HTSUS. In HRL 559452, Customs incorrectly based its decision allowing the shirts to be marked with a sewn-in label indicating they are "SAMPLE—NOT FOR RESALE" on the more lenient guidelines for the marking of commercial samples which are not entitled to subheading 9811.00.60, HTSUS, treatment. The guidelines generally provide that a wearing apparel sample may receive duty-free treatment under subheading 9811.00.60, HTSUS, only if a section is cut or torn from the garment or it is marked "SAMPLE" in indelible ink or paint.

Therefore, Customs is proposing to modify HRL 559452 to conform to the updated Textile Sample Guidelines by providing that the shirt samples involved in that case will be entitled to subheading 9811.00.60, HTSUS, treatment only if mutilated or marked "SAMPLE" in indelible ink or paint as prescribed in the relevant portion of the guidelines. The proposed modification would further provide that a sewn-in label indicating that the shirts are samples may be used in lieu of mutilation or marking with indelible ink or paint, although this option would preclude the shirts from receiving duty-tree treatment.

Accordingly, Customs proposes to modify HRL 559452. Before taking this action, consideration will be given to any written comments timely

received. The proposed ruling HRL 560135 modifying the aforementioned determination is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations, (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 10, 1997.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 5, 1996.
CLA–2–05 RR:TC:SM 559452 KR
Category: Classification
Tariff No. 9811.00.60

MS. JANE B. O'DELL
IMPART MANAGER
EDDIE BAUER
15010 N.E. 36th Street
Redmond, WA 98052

Re: Applicability of subheading 9811.00.60, HTSUS, to sample shirts.

DEAR MS. O'DELL:

This is in reference to your letter dated July 7, 1995, requesting a ruling on the acceptable marking of "SAMPLE" on shirts in order to be eligible for treatment under subheading 9811.00.60, Harmonized Tariff Schedule of the United States (HTSUS). You have submitted several samples of shirts and a "transparency gauge" for our review.

Facts:

You state that you intend to import sample garments for various purposes including: quality control testing, design and development, specification approval, and photography for catalog and advertising. You state that the appearance of the samples is often critical, particularly for photography and advertising purposes. Although you generally have the imported samples marked with a textile marking pen, there are certain garments which you belive are either transparent or of a sufficiently light color that the indelible marking pen ink will bleed through the fabric and damage the sample for some of the necessary uses, such as photographing. You would like to use a sewn-in label on such transparent and light colored garment samples.

To this effect, you have submitted a "transparency gauge" to test the opacity of the fabric. This gauge is a piece of paper with five circles on it. The circles go from a thin dotted line to increasingly thicker lines. The instructions direct the user to place a single ply of the fabric against the paper and see which, if any, of the lines show through the fabric. The user is instructed not to mark the fabric with ink if: for white and light colors, any of the circles are visible through the fabric; and for medium and dark colors, the three lightest circles are visible through the fabric. You wish to use this transparency gauge for all future importations of any garment samples to make the determination as to whether a sewn-in label maybe used instead of marking the garment samples with an ink pen.

Issue:

Whether the transparency gauge may be used to determine whether a sewn-in label may be used or if marking with an indelible ink pen must be used to designate an imported garment as a sample for treatment under subheading 9811.00.60, HTSUS.

Law and Analysis:

Subheading 9811.00.60, HTSUS, provides for the free entry of articles used in the U.S. as samples only to solicit orders for products of foreign countries, provided they are valued not over $1.00 each, or are marked, torn, perforated or otherwise treated so as to render them unsuitable for sale or for use otherwise than as samples. *See* HQ 558973 (March 30, 1995); HQ 556138 (November 18, 1991); HQ 557013 (March 19, 1993).

With regard to those samples which are valued over $1.00, the issue is the nature of the mark, tear, perforation, or other treatment which will comply with the statute. To meet the requirements of the statute, the mark, tear, perforation, or other treatment must alter items and make them unsuitable for commercial sale, while at the same time, preserve their usefulness as samples.

Guidelines regarding the manner in which textile samples should be marked or otherwise treated to render them eligible for duty-free treatment under subheading 9811.00.60, HTSUS, are set forth in the telex (Interim Update to Customs Directive 3500–07), dated February 11, 1987. *See* HQ 559079 (July 7, 1995); HQ 555875 (May 03, 1991); HQ 556138 (November 18, 1991). These guidelines provide as follows for marking of wearing apparel:

> a) The inside of the garment must be indelibly stamped with the word "SAMPLE". This stamp must be in contrasting color to the article and near the country of origin label, in one (1) inch or greater letters and physically placed on the article itself.
>
> b) The following guidelines are provided for apparel which is transparent or incapable of being marked (i.e. briefs, bikinis, hosiery, sheer or very thin garments etc.) and for which the stamping of "SAMPLE" would render the article unsuitable for use as a trade sample:
>
> > Fabric labels, not smaller than 2½" by ½" containing the words "SAMPLE-NOT FOR RESALE" must be conspicuously and permanently affixed to the article in close proximity to the country of origin label. Labels that are loosely placed on a garment, or that can be easily removed will disqualify the entire shipment from being eligible for properly marked commercial sample treatment.
>
> It must be understood that option (b) can only be used when option (a) is not applicable. This is not an either/or proposition. Under no circumstances can a label be used when a garment can be properly marked with an indelible stamp. The burden of proof lies with the importer to show that a stamp would make a garment unsuitable for modeling or photographing purposes.

In the instant case, Eddie Bauer seeks to import shirt samples in order to determine whether the shirts are of acceptable quality for their catalogue and store sales. The samples must be used for the purpose of determining whether to make a purchase from the foreign manufacturer in order to qualify for treatment under 9811.00.60, HTSUS. Samples may not be imported under this provision solely for the purpose of performing additional work on the good or making photographs for use in a catalogue. These latter uses of a sample are not solicitation for sale. In the case of photographing the samples, only the photograph will be used to solicit sales. In such a case, any photographs could be taken prior to the sample's importation to the US or the sample could be imported under a temporary importation bond.

The three sample shirts that were submitted were each marked "SAMPLE" on the interior of the garment with an indelible marker, two in black ink and one in yellow ink. In each of the garments the ink bled through so that the ink was visible on the exterior of the garment. Each of these three garments was of a white or 'bone' color. We find that these three garments could have properly been marked with a sewn-in label indicating they were a "SAMPLE—NOT FOR RESALE". In placing these garments against the "transparency gauge", all of the circles on the gauge are visible through each of the garments. In these three situations, the gauge would lead to an acceptable conclusion that these three garments may use a sewn-in label rather than ink marking. However, we are unable to state definitively that the use of this "transparency gauge" is *the* test to be used to make this determination under all circumstances. We find that with the different inks and fabrics and garment styles available, it is best left to be determined on a case-by-case basis whether ink marking or sewn-in labels are appropriate for purposes of obtaining duty-free entry under subheading 9811.00.60. Therefore, as long as the samples are imported for the purpose of soliciting sales as discussed above, and pursuant to the textile marking guidelines, the three samples provided may be marked with a sewn-in label indicating that they are a "SAMPLE—NOT FOR RESALE".

Holding:

Based on the information submitted, the three sample shirts may be marked with a sewn-in label indicating that they are a "SAMPLE—NOT FOR RESALE" pursuant to the textile marking guidelines, and be eligible for duty-free treatment under subheading 9811.00.60, HTSUS, when imported into the U.S., assuming they are used only as samples to solicit orders for foreign merchandise. The samples may not be imported under this provision solely for purposes of performing additional work on the good or making photographs for use in a catalogue. A determination as to whether marking "SAMPLE" in ink is required or a sewn-in label may be used should be made on a case-by-case basis and not exclusively through use of the submitted "transparency gauge".

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2-05 RR:TC:SM 560135 KR
Category: Classification
Tariff No. 9811.00.60

MS. JANE B. O'DELL
IMPORT MANAGER
EDDIE BAUER
15010 N.E. 36th Street
Redmond, WA 98052

Re: Modification of prior ruling HQ 559452; applicability of subheading 9811.00.60, HTSUS, to sample shirts.

DEAR MS. O'DELL:

This is in reference to a ruling issued to you, HQ 559452 (February 5, 1996), concerning the acceptable marking of "SAMPLE" on shirts in order to be eligible for treatment under subheading 9811.00.60, Harmonized Tariff Schedule of the United States (HTSUS). You submitted three samples of shirts for our review.

Facts:

According to the facts set forth in HQ 559452, Eddie Bauer intended to import sample garments for various purposes including: quality control testing, design and development, specification approval, and photography for catalog and advertising. You stated that the appearance of the samples is often critical, particularly for photography and advertising purposes. Although you advised that the imported samples are generally marked with a textile marking pen, there are certain garments which you belive are either transparent or of a sufficiently light color that the indelible marking pen ink will bleed through the fabric and damage the sample for some of the necessary uses, such as photographing. You asked whether a sewn-in label indicating that the garments are samples may be used on such transparent and light colored articles.

In HQ 559452, Customs cited to the Interim Update to Customs Directive 3500-07, Textile Sample Guidelines, and determined that the three sample shirts submitted may properly be marked with a sewn-in label indicating that they are a "SAMPLE—NOT FOR RESALE" and be eligible for duty-free treatment under subheading 9811.00.60, HTSUS. After further review of this matter, we have determined that the holding in HQ 559452 is incorrect.

Issue:

Whether a sewn-in label may be used or if marking with an indelible ink pen must be used to designate an imported garment as a sample for treatment under subheading 9811.00.60, HTSUS.

Law and Analysis:

Subheading 9811.00.60, HTSUS, provides for the free entry of articles used in the U.S. as samples only to solicit orders for products of foreign countries, provided they are valued not over $1.00 each, or are marked, torn, perforated or otherwise treated so as to render them unsuitable for sale or for use otherwise than as samples. *See* HQ 558973 (March 30, 1995); HQ 556138 (November 18, 1991); HQ 557013 March 19, 1993).

With regard to those samples which are valued over $1.00, the issue is the nature of the mark, tear, perforation, or other treatment which will comply with the statute. To meet the requirements of the statute, the mark, tear, perforation, or other treatment must alter items and make them unsuitable for commercial sale, while at the same time, preserve their usefulness as samples.

Guidelines regarding the manner in which textile samples should be marked or otherwise treated to render them eligible for duty-free treatment under subheading 9811.00.60, HTSUS, are set forth in Interim Update to Customs Directive 3500–07, Textile Sample Guidelines, dated January 4, 1989. *See* HQ 559079 (July 7, 1995); HQ 555875 (May 3, 1991); HQ 556138 (November 18, 1991). These guidelines provide as follows for marking of wearing apparel:

> A) A section may be cut or torn from the main body of the garment. This cut must be on the outside of the garment and visible and should not be on a seam or border. The size of the cut or tear should be at a minimum of 2 inches in length.
>
> B) The item may be marked with the word "SAMPLE" in indelible ink or paint. The size of the word "SAMPLE" should be at least 1 inch in height and not less than 2 inches in length.
>
> The word "SAMPLE" should be placed in a prominent area of the garment which will be visible when worn and in a contrasting color to the garment.
>
> The definition of an indelible marking is that which is incapable of being erased or obliterated. Markings in chalk or white-out are two types of markings that do not meet that definition.
>
> For items A and B above, Customs officers are authorized to allow smaller markings or cuts for garments which, in their opinion, do not meet the suggested sizes, i.e., infant wear.
>
> C) A hole or section may be punched or cut into a garment on the outside in a prominent area of at least 1 inch in diameter or approximately the size of a U.S. quarter and in a location where it cannot be covered by a patch or an emblem.

The Textile Sample Guidelines also include more lenient guidelines for marking garments as samples to be entered for photographing, modeling, and other similar uses. However, these more lenient guidelines are applicable only to garments which are not classifiable under subheading 9811.00.60, HTSUS, and are therefore *not* exempt from duty. These guidelines, which were cited in HQ 559452, provide as follows:

> WEARING APPAREL
>
> a) The inside of the garment must be indelibly stamped with the word "SAMPLE". This stamp must be in contrasting color to the article and near the country of origin label, in one (1) inch or greater letters and physically placed on the article itself.
>
> b) The following guidelines are provided for apparel which is transparent or incapable of being marked (i.e., briefs, bikinis, hosiery, sheer or very thin garments, etc.) and for which the stamping of "SAMPLE" would render the article unsuitable tor use as a trade sample:
>
> > Fabric labels, not smaller than 2½" by ½" containing the words "SAMPLE—NOT FOR RESALE" must be conspicuously and permanently affixed to the article in close proximity to the country of origin label. Labels that are loosely placed on a garment, or that can be easily removed will disqualify the entire shipment from being eligible for properly marked commercial sample treatment.
>
> It must be understood that option (b) can only be used when option (a) is not applicable. This is not an either/or proposition. Under no circumstances can a label be used when a garment can be properly marked with an indelible stamp. The burden of proof lies with the importer to show that a stamp would make a garment unsuitable for modeling or photographing purposes.

The guidelines further provide as follows:

> The provisions for properly marked commercial samples were developed to allow an option or more lenient method for samples to be entered for photographing, modeling, etc. This was done to allow these articles to enter without mutilation or marking required under 9811.00.80 which might otherwise cause the article to be of little use for such photography or modeling purposes.
>
> Properly marked [c]ommercial samples, which are not classifiable under * * * 9811.00.60, from all countries, * * * are not exempt from duty and may be entered on informal entry (including formal mail entry) * * *.
>
> * * * * * * *

The three sample shirts that were submitted in connection with HRL 559452 were each marked "SAMPLE" on the interior of the garment with an indelible marker, two in black ink and one in yellow ink. In each of the garments, the ink bled through so that the ink was visible on the exterior of the garment. Each of these three garments was of a white or 'bone' color. Pursuant to the above guidelines relating to the marking of commercial samples which are not classifiable in subheading 9811.00.60, HTSUS, we find that the three garments may properly be marked with a sewn-in label indicating they are a "SAMPLE—NOT FOR RESALE". However, if the sewn-in label is used, the shirts will not be eligible for duty-free treatment under subheading 9811.00.60, HTSUS.

It is Customs position that in order for textile wearing apparel to be considered as "unsuitable for sale or for use otherwise than as a sample," for purposes of duty-free treatment under subheading 9811.00.60, HTSUS, it must be either marked, "SAMPLE", in indelible ink or paint (as submitted) or cut or torn in the manner described in the above guidelines relating to the treatment of textile samples entered under subheading 9811.00.60, HTSUS.

Holding:

Based on the information submitted, the three sample shirts may not be entered duty-free under subheading 9811.00.60, HTSUS, if they are marked with a sewn-in label indicating that they are a "SAMPLE—NOT FOR RESALE" pursuant to the textile marking guidelines. In order to be eligible for duty-free entry under subheading 9811.00.80, HTSUS, the shirts must be marked "SAMPLE", in indelible ink or paint or cut or torn in the manner prescribed in the Interim Update to Customs Directive 3500–07, Textile Sample Guidelines, dated January 4, 1989. HQ 559452 is modified accordingly.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op. 97–88)

FEDERAL-MOGUL CORP., PLAINTIFF AND PLAINTIFF-INTERVENOR, AND TORRINGTON CO., PLAINTIFF AND PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC. AND SKF FRANCE S.A., ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 93–08–00461

(Dated July 7, 1997)

JUDGMENT

TSOUCALAS, *Senior Judge:* On January 22, 1997, this Court remanded to the Department of Commerce, International Trade Administration ("Commerce"), one issue arising from the administrative review, entitled *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order* ("*Final Results*"), 58 Fed. Reg. 39,729 (1993), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews*, 58 Fed. Reg. 42,288 (1993), *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews*, 58 Fed. Reg. 51,055 (1993), and *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Amendment to Final Results of Antidumping Duty Administrative Reviews*, 59 Fed. Reg. 9,469 (1994). *See Federal-Mogul Corp. v. United States*, 21 CIT ____, Slip Op. 97–9 (Jan. 22, 1997).

In particular, the Court ordered Commerce to recalculate the margins of NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corp., NTN Corporation and NTN Kugellagerfabrik (Deutschland) GmbH after segregating aftermarket and distributor sales as distinct levels of trade. *See id.*

On March 24, 1997, in compliance with this Court's order, Commerce filed its *Results of Redetermination Pursuant to Court Remand* ("Re-

mand Results"), with this Court. Commerce having complied with this Court's remand order, it is hereby

ORDERED that the Remand Results are affirmed, and all other issues having been previously decided, it is further

ORDERED that this case is dismissed.

(Slip Op. 97–89)

AL TECH SPECIALTY STEEL CORP., CARPENTER TECHNOLOGY CORP., CRUCIBLE SPECIALTY METALS DIVISION, CRUCIBLE MATERIALS CORP., ELECTRALLOY, DIVISION OF G.O. CARLSON, INC., REPUBLIC ENGINEERED STEELS, SLATER STEELS CORP., TALLEY METALS TECHNOLOGY, INC., AND UNITED STEELWORKERS OF AMERICA, AFL-CIO/CLC, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND ACCIAIERIE VALBRUNA S.R.L., FORONI S.P.A., AND FORONI METALS OF TEXAS, INC., DEFENDANT-INTERVENORS

Court No. 95–01–00125

(Dated July 7, 1997)

JUDGMENT

TSOUCALAS, *Senior Judge:* On November 19, 1996, this Court remanded to the Department of Commerce, International Trade Administration ("Commerce"), one issue arising from the administrative review, entitled *Notice of Final Determination of Sales at Not Less Than Fair Value: Stainless Steel Bar from Italy*, 59 Fed. Reg. 66,921 (1994). *See AL Tech Specialty Steel Corp. v. United States*, 20 CIT ____, 947 F. Supp. 510 (1996).

Specifically, the Court ordered Commerce to recalculate the value-added tax adjustment and apply a weighted-average tax rate to certain home market comparison groups and U.S. prices. *AL Tech*, 20 CIT at ____, 947 F. Supp. at 514.

On January 21, 1997, Commerce, in compliance with this Court's remand order, filed its *Final Redetermination on Remand in Stainless Steel Bar from Italy* ("Remand Results"), with this Court. Commerce having complied with the Court's remand order, it is hereby

ORDERED that the Remand Results are affirmed, and all other issues having been previously decided, it is further

ORDERED that this case is dismissed.

(Slip Op. 97–90)

NSK LTD. AND NSK CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 97–02–00216

RHP BEARINGS LTD., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 97–02–00217

(Dated July 7, 1997)

ORDER

TSOUCALAS, *Senior Judge:* On May 27, 1997, in response to motions for expedited remands to correct clerical errors, this Court issued orders remanding to the Department of Commerce, International Trade Administration ("Commerce"), the administrative review, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 2,081 (1997). *See NSK Ltd. v. United States*, 21 CIT ___, Slip Op. 97–62 (May 27, 1997); *RHP Bearings Ltd. v. United States*, 21 CIT ___, Slip Op. 97–63 (May 27, 1997).

In particular, the Court ordered Commerce to recalculate the margins of NSK Ltd. and NSK Corporation, and NSK Bearings Europe Ltd. and RHP Bearings Ltd. after correcting clerical errors contained in the computer program.

On June 24, 1997, in compliance with this Court's orders, Commerce submitted its *Final Results of Redetermination Pursuant to Court Remands* ("Remand Results"). Commerce having corrected all of the clerical errors at issue, it is hereby

ORDERED that the Remand Results are affirmed.

(Slip Op. 97–91)

D & L SUPPLY CO. AND GUANGDONG METALS & MINERALS IMPORT & EXPORT CORP., U.V. INTERNATIONAL, SIGMA CORP., SOUTHERN STAR, INC., CITY PIPE AND FOUNDRY, INC., LONG BEACH IRON WORKS, INC., AND OVERSEAS TRADE CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND ALHAMBRA FOUNDRY INC., ALLEGHENY FOUNDRY CO., BINGHAM & TAYLOR DIVISION, VIRGINIA INDUSTRIES, INC., CHARLOTTE PIPE & FOUNDRY CO., EAST JORDAN IRON WORKS, INC., LEBARON FOUNDRY INC., MUNICIPAL CASTINGS, INC., NEENAH FOUNDRY CO., OPELIKA FOUNDRY CO., INC., TYLER PIPE INDUSTRIES, INC., U.S. FOUNDRY & MANUFACTURING CO. AND VULCAN FOUNDRY, INC., DEFENDANT-INTERVENORS

Consolidated Court No. 92–06–00424

(Dated July 8, 1997)

ORDER

TSOUCALAS, *Senior Judge:* In accordance with the decision (May 8, 1997) and mandate (June 30, 1997) of the United States Court of Appeals for the Federal Circuit, Appeal Nos. 95–1437,–1450, remanding this case with instructions, it is hereby

Ordered that the judgment of this Court in *D & L Supply Co. v. United States*, 19 CIT ____, 888 F. Supp. 1191 (1995), affirming the redetermination on remand, entitled *Iron Construction Castings From the People's Republic of China, Final Results of Redetermination Pursuant to Court Remand, Slip Op. 93–245*, and finding that the Department of Commerce, International Trade Administration ("Commerce"), properly used 92.74 percent as the best information available ("BIA") rate for the 1990–91 administrative review is vacated; and it is further

ORDERED that Commerce revise the 1990–91 BIA rate applied to D & L and U.V. International et al., without relying on an antidumping rate that has been vacated as erroneous, and in a manner consistent with 19 U.S.C. § 1677e(c) (1988), and it is further

ORDERED that Commerce will report the results of this remand to the Court within sixty (60) days of the entry of this order.

(Slip Op. 97–92)

MAKITA CORP., MAKITA U.S.A., INC., AND MAKITA CORP. OF AMERICA, PLAINTIFFS *v.* UNITED STATES OF AMERICA, AND U.S. DEPARTMENT OF COMMERCE (INTERNATIONAL TRADE ADMINISTRATION), DEFENDANTS, AND BLACK & DECKER (U.S.) INC., INTERVENOR-DEFENDANT

Court No. 93–08–00450

MAKITA CORP., MAKITA U.S.A., INC., AND MAKITA CORP. OF AMERICA, PLAINTIFFS *v.* UNITED STATES OF AMERICA, AND UNITED STATES INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND BLACK & DECKER (U.S.) INC., INTERVENOR-DEFENDANT

Court No. 93–08–00451

[Plaintiffs' motions for judgments on agency records denied; actions dismissed.]

(Decided July 8, 1997)

Verner, Liipfert, Bernhard, McPherson and Hand, Chartered (*William A. Zeitler, Douglas W. Hall* and *Steven R. Johnson*) for the plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jeffrey J. Bernstein*); and Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Linda A. Andros*), of counsel; for defendants United States and U.S. Department of Commerce.

Office of the General Counsel, U.S. International Trade Commission (*Lyn M. Schlitt, James A. Toupin* and *Robin L. Turner*) for defendant U.S. International Trade Commission.

Stroock & Stroock & Lavan (*James Taylor, Jr., Will E. Leonard* and *Alexei J. Cowett*) for the intervenor-defendant.

OPINION AND ORDER

AQUILINO, *Judge:* In these actions, the plaintiffs have interposed motions for judgments on the records compiled by the International Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Final Determinations of Sales at Less Than Fair Value: Professional Electric Cutting Tools and Professional Electric Sanding/Grinding Tools from Japan*, 58 Fed.Reg. 30,144 (May 26, 1993), as amended, *Antidumping Duty Order and Amended Final Determination: Professional Electric Cutting Tools from Japan*, 58 Fed.Reg. 37,461 (July 12, 1993), and by the U.S. International Trade Commission ("ITC") *sub nom. Professional Electric Cutting and Sanding/Grinding Tools from Japan*, 58 Fed.Reg. 37,967 (July 14, 1993).

Jurisdiction of the court is pursuant to 28 U.S.C. §1581(c). Its standard for review of the contested agency determinations is whether they are unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B).

I

In its antidumping-duty petition filed with the ITA and ITC, Black & Decker (U.S.) Inc. alleged the subject to be professional electric cutting tools and sanding/grinding tools:

> Professional electric cutting tools have blades or other cutting devices used for cutting wood, metal, and other materials. [They] include chop saws, cut-off saws, cordless saws, circular saws, worm drive saws, hypoid saws, jig saws, reciprocating saws, miter saws, planers, routers, jointers, angle cutters, shears, nibblers, and similar cutting tools. Professional electric sanding/grinding tools have moving abrasive surfaces used primarily for grinding, scraping, clearing, deburring, and polishing wood, metal, and other materials. * * * These tools are electro-mechanical tools and have self-contained electric motors. Some of these tools have electric cords; others are battery powered and are cordless. They are used by tradesmen, such as carpenters and electricians, for residential and non-residential construction and by industrial workers for a variety of industrial uses.
>
> Professional electric power tools are typically designated, advertised, and sold as being suitable for "professional", "heavy-duty", or "industrial" use to distinguish such tools from "home" or "consumer" use electric power tools. [They] are distinguished by the producers and purchasers from consumer tools by their durability and ability to handle heavier work loads. Imported and domestically produced professional electric power tools typically, but not necessarily, are advertised as meeting the minimum safety standards promulgated by the Occupational Safety and Health Administration. Finally, professional electric power tools are sold at prices substantially higher than consumer electric power tools.
>
> Petitioner believes that all of the exports to the United States by Makita Corporation * * * Hitachi Ltd. * * * and Ryobi Ltd. * * * are professional electric power tools. * * *[1]

The ITA's notice of initiation of an investigation of the petition's allegations called upon the interested parties "to more accurately describe"[2] the tools at issue. Whereupon the petitioner suggested seven physical characteristics to distinguish consumer tools from those for professionals, to wit:

> (1) The predominate use of sleeve or plain bearings.
> (2) Spur or straight bevel gearing.
> (3) Thermo plastic jacketed power supply cord with a length less than 8 feet.
> (4) Power supply cord restrained by molded-on cord protector.
> (5) The absence of user serviceable motor brushes.
> (6) The predominate use of non-heat treated transmission parts.
> (7) One coil per slot armature construction.

---

[1] Defendants' Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Administrative Record [hereinafter cited as "ITA Memorandum"], Appendix 1 at 3–4.

[2] 57 Fed.Reg. 28,483 (June 25, 1992).

Plaintiffs' ITA Appendix 2, pp. 5–6. While the agency's preliminary determinations relied on these characteristics to the extent that tools possessed of at least five of the seven (or four of six) were considered to be for consumers and thus not subject to the investigation, the parties were invited therein to propose "criteria defining 'corded' professional power tools * * * and additional criteria that should be considered in distinguishing professional and consumer tools." 58 Fed.Reg. 81, 82 (Jan. 4, 1993).

The above-cited final determinations of the ITA were that

> professional electric cutting tools (PECTs) and professional electric sanding/grinding tools * * * from Japan are being, or are likely to be, sold in the United States at less than fair value, as provided in * * * 19 U.S.C. 1673d[].

58 Fed.Reg. at 30,144. Weighted-average dumping margins were reported to be 54.43 and 46.75 percent for Makita tools within the two covered categories. *See id.* at 30,151.

Upon referral of these determinations to the ITC, the commissioners concluded that an industry in the United States is materially injured by reason of imports from Japan of professional electric cutting tools but not sanding/grinding tools. *See* 58 Fed.Reg. 37,967. This resulted in publication of the antidumping-duty order solely as to the cutting tools, with the amended estimated margin set at 54.52 percent. *See* 58 Fed.Reg. 37,461.

These actions ensued, with the plaintiffs Makita contesting the affirmative determinations of both agencies.

II

The motion which the plaintiffs direct at the ITA pursuant to CIT Rule 56.2 has four major points of contention, namely, (a) the definition of "professional" electric cutting tools is not based on substantial evidence; (b) the investigation of U.S. sales of used and reconditioned tools was neither supported by substantial evidence nor otherwise in accordance with law; (c) the "pooling" of home-market products is not authorized by law; and (d) the agency erred in its adjustments to foreign-market value and U.S. price.

A

The plaintiffs argue that the "difficulty * * * in defining the so-called 'professional' tools * * * clearly shows that the definition which the Department ultimately came up with was arbitrary". Plaintiffs' Brief [ITA], p. 21. That definition is as follows:

> "Corded" and "Cordless" PECTs are included within the scope of this order. "Corded" PECTs, which are driven by electric current passed through a power cord, are, for purposes of this order, defined as power tools which have at least five of the following seven characteristics:
>
> (1) The predominate use of ball, needle, or roller bearings (i.e., a majority or greater number of the bearings in the tool are ball, needle, or roller bearings);

(2) Helical, spiral bevel, or worm gearing;
(3) Rubber (or some equivalent material which meets UL's specifications S or SJ) jacketed power supply cord with a length of 8 feet or more;
(4) Power supply cord with a separate cord protector;
(5) Externally accessible motor brushes;
(6) The predominate use of heat treated transmission parts (i.e., a majority or greater number of the transmission parts in the tool are heat treated); and
(7) The presence of more than one coil per slot armature.

If only six of the above seven characteristics are applicable to a particular "corded" tool, then that tool must have at least four of the six characteristics to be considered a "corded" PECT.[3]

"Cordless" PECTs, for the purposes of this order, consist of those cordless electric power tools having a voltage greater than 7.2 volts and a battery recharge time of one hour or less.

58 Fed.Reg. at 37,462. *See also* 58 Fed.Reg. at 30,145. On its face, this reflects extrapolation of the petitioner's "consumer" criteria, *supra*. *Cf.* Plaintiffs' ITA Appendix 8.

Be that as it may, upon review of the record developed before the agency, this court cannot concur that this definition is "arbitrary", as alleged. On the contrary, there is substantial evidence, as defined by the courts[4], on the record in support of differentiating professional from consumer electric cutting tools. It includes, for example, representations to the effect that the

> professional power tool is designed to be more powerful, to last longer and to perform better under stressful conditions than its consumer counterpart. The difference is one of function and design. Both do the jobs they were designed to do extremely well. But, they are designed for totally different applications.

Brief of Defendant-Intervenor [ITA], Appendix 5, p. 1. This statement also indicates that professional models have longer cords, which are made of more durable materials that remain flexible in cold weather and are also removable, have more durable switches, utilize more powerful motors, and contain ball bearings rather than less-costly and lower-quality sleeves. *See id*. at 2–8, 13–14. Testimony of another engineer in the record shows that Black & Decker had two production lines at a plant, one devoted to manufacturing consumer power tools and the other to those for professionals. *See* ITA Memorandum, Appendix 7, p. 69 and record document ("R.Doc") 54. That engineer also explained the method by which the company settled on the factors to distinguish professional from consumer tools. *See* ITA Memorandum, Appendix 7, pp. 70–73.

---

[3] For improved understanding, this sentence is being quoted separately from characteristic (7), with which it is printed in the original.

[4] *See, e.g., Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Matsushita Electric Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed.Cir. 1984); *Timken Co. v. United States*, 12 CIT 955, 962, 699 F.Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed.Cir. 1990).

Catalogues submitted by Black & Decker, Hitachi Power Tools U.S.A. Ltd. and Makita all differentiate electric cutting tools, with some characterized as heavy-duty and suited for professionals and others as lighter-duty for use at home. A Black & Decker catalogue claims "a big difference" between them, stating that professional tools

> are used by tradesmen such as carpenters or electricians or by serious do-it-yourselfers who need rugged products that can stand up to day-in, day-out continuous use. These heavy duty [p]rofessional tools and accessories work all day, often under adverse conditions such as extreme cold or around dirt and dust. So they are designed to be more powerful, to handle heavy work loads, to sustain overloading and overheating for longer periods of time, to last longer and to perform better under stressful conditions.[5]

In Makita's catalogue, three levels of cordless power tool are discussed, with only two of the three models seemingly suitable for professionals. *See* ITA R.Doc 1, Exhibit II A, pp. 5–6. Similarly, Hitachi refers to three levels of circular saws: medium, heavy and super duty. *See id.* at 35–36.

Other literature in the record differentiates between "professional" and "consumer" tools. One article, for example, cites some twelve to 14 physical characteristics of "professional" corded tools. *See* Plaintiffs' Brief [ITA], Appendix 10, Exhibit II C–1 (*Power Tools, What's the Difference Between Consumer and Professional*, Wood Magazine, Nov. 1991, at 58). *See also* ITA Memorandum, Appendix 6, Attachment [B](*Commercial Versus Consumer Models*, Better Homes & Gardens: Wood, Oct. 1990, at 42–43 ("consumer" cordless power tools do not need the power and precision required of "professional" models)).

The plaintiffs dispute the ITA's choice of power and durability as the best defining characteristics since "there is no evidence in the record showing that the Department's seven characteristics for corded electric cutting 'professional' tools fully and accurately capture 'power' and 'durability' in tools." Plaintiffs' Brief [ITA], p. 26. They also contend that

> there is no justification for the Department's selective choice of only *certain* characteristics it believes are associated with "power" and "durability". * * * Logic requires that *all* characteristics which impart power and durability be included in any definition based on these qualities.

Id. at 25 (emphasis in original). In addition, the plaintiffs claim that the evidence relied upon by the ITA shows "no uniformity in what characteristics define a 'professional' tool". *Id.* at 28–29. Contending that the agency's seven factors for corded tools and two for cordless models are arbitrary and illogical, the plaintiffs take the position that neither wholesalers, purchasers, the Harmonized Tariff Schedule of the United

---

[5] ITA R.Doc 1, Exhibit II C–2, p. 1. A 1991 report published by the Caney Research Group, for example, surveyed contractors whether they planned to purchase consumer-quality power tools for their work. ITA Memorandum, Appendix 6, Attachment F. Eighty-seven percent replied that they would not use such tools in place of professional models. *See id.* Further:

> * * * No building contractor would work without a circular saw, usually a heavy-duty "professional" model priced at $150 or more.

Id., Attachment D.

States, nor industry or marketing standards use the ITA's definition of "professional" tools.

The agency's response has been as follows:

> * * * Having determined that physical characteristics which impart power and durability would be the most useful for clarifying scope, we first examined petitioner's criteria and found that each related to the motor, overall construction, and power supply—the primary factors which affect the power and durability of the tool. Thus, we concluded that these factors were reliable indicators of the power and durability of a tool. Next, we compared petitioner's characteristics to the physical characteristics of tools imported into the United States and determined that these characteristics offered a practical and consistent means of distinguishing between professional and consumer tools. * * *

Id., Appendix 8, p. 4. Indeed, interested parties refer to criteria of the kind accepted by the ITA to distinguish "professional" from "consumer" tools. A letter by Ryobi counsel indicates motors, gears, switches, electrical cords and housings differentiate "professional" and "consumer" tools in that company's view. *See* ITA Memorandum, Appendix 9, pp. 34–35. These five factors match those first proposed in the petition herein. *See* Brief of Defendant-Intervenor [ITA], Appendix 3, pp. 7–8. Hitachi apparently perceives a distinction between "professional" and "consumer" tools but believes that durability is impossible to characterize objectively. *See id.*, Appendix 7, p. 2. It subsequently suggested that capacity and power input should be used as defining characteristics. *See id.* at 3. Hitachi also suggested breaking the tools down into even smaller classes, with circular saws and jig saws, for example, each constituting a separate class. *See id.* SB Power Tool Co. made two suggestions to change slightly the seven criteria proposed by Black & Decker. *See id.* And the ITA subsequently adopted one of them. *See id.* at 4. As for the plaintiffs, a statement by the president of Makita U.S.A. Inc. acknowledges that "certain hand held tools are sold to and are for the single use of professionals, where purchase and use by consumers is [*sic*] only inconsequential."[6] And they suggested that three criteria, namely, capacity, weight and type, determine whether tools are for use by professionals. *See id.* at 1–2.

The record reflects that the ITA reasonably considered such comments of the interested parties. Concluding that the characteristics proposed by the petitioner provided "a practical and consistent means of distinguishing between professional and consumer tools", the agency did not adopt the approach advocated by Makita. *See id.* at 4. Although the evidence on the record may not provide a clear consensus on the definition of "professional" tool, it does not negate the ITA's position. The

---

[6] ITA R.Doc 85, Exhibit C, p. 1. But the plaintiffs did submit to the ITA 552 form statements which claimed no distinction between "professional" and "consumer" tools.

agency examined it, took the parties' comments thereon into account, and reached a supportable determination:

> There should be little doubt by now that the scope of an investigation and subsequent determination pursuant to the Trade Agreements Act of 1979, as amended, lies largely in the ITA's discretion. *E.g., Mitsubishi Electric Corp. v. United States*, 898 F.2d 1577, 1583 (Fed.Cir. 1990). And the agency generally exercises this "broad discretion to define and clarify the scope of an antidumping investigation in a manner which reflects the intent of the petition." *Minebea Co. v. United States*, 16 CIT 20, 22, 782 F.Supp. 117, 120 (1992), *aff'd on other grounds*, 984 F.2d 1178 (Fed.Cir. 1993).

Kern-Liebers USA, Inc. v. United States, 19 CIT ____, ____, 881 F.Supp. 618, 621 (1995). *Cf. INA Walzlager Schaeffler KG v. United States*, 108 F.3d 301 (Fed.Cir. 1997).

B

In reporting that its antidumping-duty order covers "all hand-held PECTs and certain bench-top, hand-operated PECTs", the ITA refers, among other things, to headings 8461 and 8465 of the Harmonized Tariff Schedule of the United States. 58 Fed. Reg. at 37,461. Certain subheadings of the former, in particular 8461.50.00.10, encompass "Used or rebuilt" cutting tools. The plaintiffs state that such tools are carefully inspected and

> reconditioned by [them] in the United States and are subsequently sold as reconditioned (i.e., remanufactured) merchandise[,]

but that the agency erred in including them within the scope of its determination. Plaintiffs' Brief [ITA], p. 60. They argue that the petition focused only on imported, new PECTs and did not even cite subheading 8461.50.00.10 (in contrast with other sections of the HTSUS actually enumerated therein); that other federal agencies consider new and used goods to constitute separate classes of merchandise; and that inclusion of their "remanufactured" goods was unfair in that it inflated the overall dumping margin(s).

None of these arguments counsels relief. This and other courts have held that a petitioner is not required to circumscribe the entire universe of articles which might possibly be covered[7] by the order it seeks. *Nitta Industries Corp. v. United States*, 16 CIT 244, 248 (1992), citing *American NTN Bearing Mfg. Corp. v. United States*, 14 CIT 320, 327–28, 739 F.Supp. 1555, 1562 (1990), *aff'd*, 997 F.2d 1459 (Fed.Cir. 1993). Indeed, the responsibility for such definition lies with the ITA, not the domestic petitioner. *See, e.g., Mitsubishi Electric Corp. v. United States*, 898 F.2d 1577, 1582 (Fed.Cir. 1990). And the agency has discretion in carrying out that responsibility to look to the U.S. tariff schedules or not. In the matter at bar, for example, while referring to sections of the HTSUS in its final determination and resultant antidumping-duty order, the ITA

[7] The court notes in passing that petitioner Black & Decker denies any intent to exclude plaintiffs' remanufactured tools, contending that they compete with its own sales of such kind of goods, as well as of new ones: "Reconditioned tools are direct substitutes for new tools." Brief of Defendant-Intervenor [ITA], p. 55.

specifically eschewed making them dispositive. *See* 58 Fed.Reg. at 30,145, 37,462. That those sections may be of moment to other agencies, such as the U.S. Customs Service or the Federal Trade Commission, or that they in the exercise of their particular lawful responsibilities may treat classes or kinds of merchandise differently, does not compel the Commerce Department to follow their approach(es) in its enforcement of the Trade Agreements Act of 1979, as amended. *See, e.g., Royal Business Machines, Inc. v. United States*, 1 CIT 80, 87 n. 18, 507 F.Supp. 1007, 1014 n. 18 (1980), *aff'd*, 669 F.2d 692 (Fed.Cir. 1982). Finally, if the definition of the scope of such enforcement is in accordance with that law, understandably all those goods within that ambit will influence the calculation of any dumping margin.

C

At the time of the final determination at bar, that statute stated the foreign-market value of imported goods to be the price at which such or similar merchandise was sold in the usual commercial quantities and in the ordinary course of trade for home consumption. 19 U.S.C. §1677b(a)(1)(A). And the determination reports that the ITA

> based all product comparisons in the U.S. and home markets on sales of similar merchandise * * * because identical merchandise was not sold in the two markets. We selected similar merchandise by applying the following criteria in descending order of importance: (1) configuration; (2) corded vs. cordless; (3) capacity; (4) power (amps, volts, watts); (5) speed; (6) housing material; and (7) size. Where we found more than one home market model equally similar to a U.S. model in terms of these criteria, we treated these models as equally similar * * *.

58 Fed.Reg. 30,145–46. It also reports objection to agency comparisons of Makita tools for the U.S. market with "pools" of home-market models sharing the seven product characteristics. *Id.* at 30,149 (*Comment 15*). The plaintiffs renew this objection now, arguing that such "pooling" is not authorized by the law. *See* Plaintiffs' Brief [ITA], pp. 64–71. Their proposal has been to select from each group the "unique model" which is "most similar" to the U.S. product. *Id.* at 66. They quote from *Timken Co. v. United States*, 10 CIT 86, 630 F.Supp. 1327 (1986), that while the

> statute does not make explicit whether, if two or more products fall within the definition of a given subsection of the statute, the ITA must determine which of those products is *most* similar to merchandise sold in the United States. However, such a requirement is implicit in the statutory scheme. The arrangement of definitions in the statute is such that the requirement that the ITA choose merchandise within the first applicable definition amounts to a requirement that it choose the most similar merchandise—at least insofar as the broad statutory definitions of "such or similar merchandise" are concerned. The spirit if not the letter of this requirement obligates the agency to also ascertain what constitutes the most similar merchandise from within a given definition.

10 CIT at 96, 630 F.Supp. at 1337 (emphasis in original). Indeed, in *United Engineering & Forging v. United States*, 15 CIT 561, 567, 779 F.Supp 1375, 1381 (1991), *aff'd*, 996 F.2d 1236 (Fed.Cir. 1993), this court had occasion to quote further from the foregoing *Timken* opinion, 10 CIT at 98, 630 F.Supp. at 1338, that

> [i]t is of particular importance that the administering agency itself make the required determination of what constitutes most similar merchandise * * *, considering that the issue may be a complex one on which reasonable minds could differ. For example, of two potentially "similar" foreign market products, one product could be most similar to merchandise sold in the United States in its use, while the other might be more similar in its materials. It is the administering agency rather than an interested party that should make the determination as to what "similar" characteristics are of the most significance. Additionally, it is hard to imagine that a foreign manufacturer, given the option of selecting what constitutes similar merchandise, and assuming that there exists more than one product from which a choice can be made, would not make the choice of merchandise most advantageous to itself.

Notwithstanding this and subsequent cases, scores of which have reviewed ITA comparisons of varying versions of roller bearings for home markets and for the United States[8], the plaintiffs claim "no precedent"[9] supports the agency's approach herein. While the court can concur that few cases to date reflect pooling of home-market goods for purposes of comparison[10], it cannot agree that the ITA was without authority to do so. Subsequent to the filing of the briefs herein[11], the court of appeals in *Koyo Seiko Co. v. United States*, 66 F.3d 1204 (Fed. Cir. 1995), sustained the agency's comparison of the roller bearings at issue via five stated criteria without any limitation on the deviation of any one of them and then choosing as the best match the model for which the sum of the deviations was the lowest. *See* 66 F.3d at 1207. The court agreed that

> Congress has implicitly delegated authority to Commerce to determine and apply a model-match methodology necessary to yield "such or similar" merchandise under the statute. This Congressional delegation of authority empowers Commerce to choose the manner in which "such or similar" merchandise shall be selected.

Id. at 1209, citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, *reh'g denied*, 468 U.S. 1227 (1984); *Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442 (Fed.Cir. 1994); *Texas*

---

[8] *See, e.g., NSK Ltd. v. [United States]*, 17 CIT 987 (1993); *NTN Bearing Corp. of America v. United States*, 17 CIT 1149, 835 F.Supp. 646 (1993); *NTN Bearing Corp. of America v. United States*, 18 CIT 629, 858 F.Supp. 215 (1994); *Koyo Seiko Co. v. United States*, 18 CIT 711, 861 F.Supp. 87 (1994); *SKF USA Inc. v. United States*, 19 CIT ___, 874 F.Supp. 1395 (1995); *Torrington Co. v. United States*, 19 CIT ___, 881 F.Supp. 622 (1995); *Federal-Mogul Corp. v. United States*, 20 CIT ___, 918 F.Supp. 386 (1996); *NSK Ltd. v. United States*, 20 CIT ___, 919 F.Supp. 442 (1996).

[9] Plaintiffs' Reply Brief [ITA], p. 52.

[10] The agency refers to its *Final Determinations of Sales at Less Than Fair Value: Sweaters from Korea*, 55 Fed.Reg. 32,659 (Aug. 10, 1990), and *Final Determinations of Sales at Less Than Fair Value: Sweaters from Taiwan*, 55 Fed.Reg. 34,585 (Aug. 23, 1990), as precedent. *Cf. Federal-Mogul Corp. v. United States*, 20 CIT at ___, 918 F.Supp. at 400 ("Commerce's use of the family model match methodology * * * is in accordance with law").

[11] The court notes in passing that the papers submitted by all of the parties are of such quality as to obviate any need to burden them with oral argument, the formal motion for which is thus hereby denied.

Crushed Stone Co. v. United States, 35 F.3d 1535 (Fed.Cir. 1994). Moreover, the final determination before this court reports that

> in only twenty percent of the [matches] was more than one home market model identified as equally similar. Within this grouping, only those models with a difmer of 20 percent or less have been used in the comparison.

58 Fed.Reg. at 30,150. The record substantiates this response by the ITA, which is also in accordance with law.

D

The plaintiffs contend that the agency erred in calculating foreign-market value by disallowing adjustments for Makita blanket-order and quantity discounts and for delivery expenses incurred by salesmen. They also contest readjustment of the U.S. price for certain cash discounts.

(1)

According to the final determination, the ITA denied a circumstances-of-sale adjustment for discounts for blanket orders by "dropship dealers"[12] on the ground that it

> examined this expense at verification and found that the effect of the discount is to reduce the amount paid to the wholesaler (the first unrelated customer) by the retailer but not the amount paid to Makita from the wholesaler. Consequently, Makita bears no cost as a result of this discount and this does not qualify as a reduction to FMV.

58 Fed.Reg at 30,148 (*Comment 5*). Counsel now add that the

> fact that the wholesaler was paid less by the dealer was irrelevant in calculating FMV. Because Makita * * * did not establish a direct relationship between the discounts and the relevant sales, Commerce properly disallowed the claimed adjustment.

ITA Memorandum, p. 48 (footnote omitted). They cite for support, *id.* at 47, *Smith-Corona Group v. United States*, 713 F.2d 1568, 1580 (Fed.Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).

The plaintiffs do not deny that adjustments pursuant to the Trade Agreements Act of 1979, as amended, 19 U.S.C. §1677b–(a)(4) (1993), as interpreted by the foregoing case and others, "must have a reasonably direct relationship to the sales under consideration and that value determinations must be based on proof of actual costs not on estimates, approximations, or averages." 713 F.2d at 1580. Rather, they claim

> [a]ll documents establish that Makita *did* bear the cost of th[e blanket-order] discount, which is the only relevant fact that need be considered by the Department.

Plaintiffs' Reply Brief [ITA], p. 56 (emphasis in original, citing Plaintiffs' ITA Appendixes 25, pp. 12–13 and 26, Exhibits 19, 19A, 20). In oth-

[12] Plaintiffs' ITA Appendix 25, pp. 12–13, para. 2.

er words, their claim is that the agency's denial of the adjustment is unsupported by substantial evidence on the record.

The court cannot concur. After examination of the confidential versions of all of the cited documents, the court cannot conclude that the contents prove plaintiffs' premise.

(2)

In determining foreign-market value, the ITA reports that it disallowed adjustment for Makita's claimed quantity discounts due to "large positive values * * * which we determined to be incorrect". 58 Fed.Reg. at 30,146. The record reflects that the company had been asked to amend the numbers which apparently arose from "key-punch errors". Defendants' ITA Appendix 11, p. 22. That home-market verification report, confidential document 53, indicates how even such entries, which apparently were not corrected[13], can and do skew ability to make accurate adjustment.

Nonetheless, the plaintiffs point to a sentence in the report that "[n]o discrepancies were noted regarding Makita's method for reporting this discount"[14] and argue that the "drastic remedy of disallowance of the entire quantity discount is hardly justified, * * * arbitrary and unreasonable."[15], given only the "'key-punch type' problem." Plaintiffs' Reply Brief [ITA], p. 61, n. 77. It has been held, however, that the ITA is not obligated to accommodate errors of a respondent which fails to timely correct them. *E.g.*, *RHP Bearings v. United States*, 19 CIT ____, ____, 875 F.Supp. 854, 856 (1995). That is, the burden of correct(ing) requested, necessary information remains upon its source throughout a proceeding such as this. *Cf. Yamaha Motor Co. v. United States*, 19 CIT ____, ____, 910 F.Supp. 679, 687 (1995); *Nachi-Fujikoshi Corp. v. United States*, 19 CIT ____, ____, 890 F. Supp. 1106, 1111 (1995); *NSK Ltd. v. United States*, 17 CIT 590, 592, 825 F.Supp. 315, 319 (1993). In the light of such cases, this court cannot and therefore does not conclude that the agency's disallowance of an adjustment for plaintiffs' quantity discount was not in accordance with law.

(3)

The record indicates, and the ITA has found, that Makita salesmen themselves delivered some of the tools they sold to customers in the home market. Hence, the agency rejected the company's actual home-freight expenses, opting for best information otherwise available within the meaning of 19 U.S.C. § 1677e–(c) (1993).

> * * * However, the respondent's proposed method for calculating this expense contained many discrepancies and failed to accurately measure [it] * * *. The amount allowable to a commercial carrier is an independent indicator of what [it] would be. Therefore, as BIA

---

[13] *Cf.* Plaintiffs' Reply Brief [ITA], pp. 60–62.

[14] Plaintiffs' ITA Appendix 26, p. 23.

[15] Plaintiffs' Reply Brief [ITA], p. 61.

> for the salesmen's portion of inland freight, we used the commercial truck expense claimed by respondent.

58 Fed.Reg. at 30,147 (*Comment 2*). The discrepancies related to calculation of salary amounts associated with transporting of the merchandise by salesmen, to wit: the number of deliveries claimed by some were incorrect; some deliveries claimed were unaccounted for; other deliveries were double counted; and the number of work hours in a day were overstated. *See* Defendant-Intervenor ITA Appendix 24, p. 5. Counsel now add that,

> [a]s a result, Commerce determined that the delivery time ratio reported by Makita was not corroborated by the information examined at verification. * * * At the same time, because Makita was able to establish at verification that sales branches often requested approval to hire commercial delivery services to free their salesmen from the delivery function, Commerce properly determined that the commercial carrier's expenses should be utilized as the best information available * * * for this portion of the home market freight expense.

ITA Memorandum, p. 49 (citation omitted).

The plaintiffs respond that, "[g]iven the nature of the expense, only an estimate, not actual figures, could reasonably be used"[16] and that, in any event, the discrepancies discovered by the agency were but a "few minor"[17] ones. From their presumably-most-knowledgeable perspective, this may be true, but inhouse understanding does not govern the ITA, its statute does, which required it to use best information available when, as herein, it was unable to verify the accuracy of the data submitted. *See* 19 U.S.C. § 1677e(b) (1993). *See also* 19 C.F.R. § 353.37(a) (1993).

The court finds the agency selection to have been in accordance with that law, in particular in light of the recorded fact that

> Makita sales branches do request approval from Makita's Anjo [Japan] office to hire commercial delivery services in order to free their salesmen from making deliveries.

Defendant-Intervenor ITA Appendix 24, p. 6.

(4)

The plaintiffs concede that, during attempted verification of U.S. price, the ITA detected a computational error on their part with regard to a line-item discount for freight, which had not been subtracted from the gross unit price for some transactions. Whereupon the agency recalculated the cash discounts, albeit relying on Makita's methodology. *See* 58 Fed.Reg. at 30,149 (*Comment 13*). Nonetheless, the plaintiffs argue that the recalculation goes beyond a correction of error; it "is overly broad, and penalizes Makita out of proportion with the actual error found." Plaintiffs' Reply Brief [ITA], p. 63.

---

[16] *Id.* at 58.

[17] *Id.* at 57, 58.

The court is not persuaded after review of the record that this is the case. That is, the recalculation only appears to affect the admittedly-erroneous entries. Furthermore, even if it encompassed all of the split sales in question, the plaintiffs fail to quantify any resultant, actual "penalty". Hence, their prayer for any relief from the ITA's recalculation of certain cash discounts "for selected sales at one [U.S.] branch office because an amount for freight allowance was not subtracted from the gross unit price"[18] must be denied.

III

As shown above, the plaintiffs also contest the contingent injury determination of the ITC. Its preliminary determination pursuant to 19 U.S.C. § 1673b(a) had been

> that there is a reasonable indication that an industry in the United States is materially injured by reason of imports from Japan of professional electric cutting and sanding/grinding tools, provided for in subheadings 8461.50.00, 8465.91.00, 8508.20.00, and 8508.80.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value (LTFV).

Professional Electric Cutting and Sanding/Grinding Tools From Japan, USITC Pub. 2536, p. 3 (July 1992). Upon publication of the ITA's final determinations of sales of both kinds of professional tools at less than fair value, 58 Fed.Reg. 30,144 (May 26, 1993), the Commission concluded that an industry in the United States is materially injured by reason of imports of cutting, but not sanding/grinding, tools from Japan.[19]

A

While the published views of all six members of the ITC are in support of this determination, they perceive the "like product" contemplated by the governing statute, 19 U.S.C. § 1677(10) (1993)[20], differently. Chairman Newquist and Commissioners Rohr and Nuzum found that

> the differences between professional and consumer electric tools in physical characteristics, uses, producer and customer perceptions, production processes, and limited interchangeability outweigh the similarities in terms of channels of distribution[21,]

whereas the analysis of such factors on the part of Vice-Chairman Watson and Commissioners Brunsdale and Crawford led them to "conclude that no clear dividing lines exist between professional and consumer electric cutting tools". Pub. 2658, p. 62.

(1)

The plaintiffs take the position that the

---

[18] 58 Fed.Reg. at 30,149 (*Comment 13*).

[19] *See Professional Electric Cutting and Sanding/Grinding Tools From Japan*, USITC Pub. 2658, p. 3 (July 1993) [hereinafter cited in short form "Pub. 2658"].

[20] Subsection (4)(A) of this section 1677 defines "industry" to mean in general

> the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product; * * *.

[21] Pub. 2658, p. 18.

> Commission erred in failing to articulate a coherent, common, single majority position on the definition of the "like product" in the investigation. Not having been able to adequately define the "like product," [it] should have terminated the investigation with a negative determination.

Complaint [ITC], para. 12. It has been held, however, that,

> [a]lthough the Court and the domestic industries themselves would prefer that the Commission agree on the like product, there is no statutory requirement for each of the commissioners to agree on the same like-product definition.

Citrosuco Paulista, S.A. v. United States, 12 CIT 1196, 1210, 704 F.Supp. 1075, 1088 (1988). Indeed, the Trade Agreements Act has contemplated differing views among members of the Commission from the beginning. *See* Pub.L. No. 96–39, Title I, §771(11), 93 Stat. 144, 179–80 (1979); H.R.Rep. No. 317, 96th Cong., 1st Sess. 46 (1979). Hence, it has provided that, if

> the Commissioners voting on a determination * * * are evenly divided as to whether the determination should be affirmative or negative, the Commission shall be deemed to have made an affirmative determination.

19 U.S.C. § 1677(11) (1993). Of course, this is not the circumstance presented at bar, which apparently is not directly addressed by either the statute or judicial precedent. Be this as it may, the court concludes that neither precludes affirmance of each definition of like product[22] given the long-standing judicial definition of substantial evidence, which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"[23], combined with the rule that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Grupo Industrial Camesa v. United States*, 85 F.3d 1577, 1582 (Fed.Cir. 1996); *Taiwan Int'l Standard Electronics, Ltd. v. United States*, 21 CIT ___, ___, 963 F.Supp. 1202, 1205 (1997). *But compare USX Corp. v. United States*, 12 CIT 205, 206 n. 2, 682 F.Supp. 60, 63 n. 2 (1988) ("If clear reasoning supporting a determination is lacking, * * * the determination may appear to be arbitrary if viewed in the context of contrary determinations based on seemingly similar facts").

As indicated above, in analyzing like product commissioners consider certain factors, essentially physical characteristics and uses, inter-

---

[22] It has been held that "Commerce's designation of the class or kind of merchandise sold at LTFV does not control the Commission's definition of the industry injured in its sales of like products." *Hosiden Corp. v. Advanced Display Mfrs. of America*, 85 F.3d 1561, 1568 (Fed.Cir. 1996), relying on *Algoma Steel Corp. v. United States*, 12 CIT 518, 523, 688 F.Supp. 639, 644 (1988), *aff'd*, 865 F.2d 240 (Fed.Cir.), *cert. denied*, 492 U.S. 919 (1989); *Mitsubishi Electric Corp. v. United States*, 898 F.2d 1577, 1584 (Fed.Cir. 1990); *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT 634, 637 n. 4, 693 F.Supp. 1165, 1168 n. 4 (1988). Furthermore, neither industry-wide standards nor tariff provisions, as interpreted by the U.S. Cus-toms Service, are necessarily controlling. *See, e.g., Roquette Freres v. United States*, 7 CIT 88, 95, 583 F.Supp. 599, 605 (1984).

[23] *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Micron Technology, Inc. v. United States*, ___ F.3d ___, (Fed.Cir. June 30, 1997); *Taiwan Int'l Standard Electronics, Ltd. v. United States*, 21 CIT ___, ___, 963 F.Supp. 1202, 1205 (1997).

changeability, channels of distribution, producer and customer perceptions, circumstances of manufacture, and price. *See, e.g., Torrington Co. v. United States*, 14 CIT 648, 652, 747 F.Supp. 744, 749 (1990), *aff'd*, 938 F.2d 1278 (Fed.Cir. 1993). And Congress did not intend such consideration to be so narrow

> as to permit minor differences in physical characteristics and uses to lead to the conclusion that the [domestic] product and [imported] article are not "like" each other, nor should the definition of "like product" be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under consideration[,[24]]

or anticipate that every investigation would entail precisely the same methodological approach or priority to the foregoing factors. *See, e.g., Chung Ling Co. v. United States*, 16 CIT 636, 647, 805 F.Supp. 45, 54 (1992).

(2)

The record at hand includes information developed by the ITC staff itself, as well as from producer, importer and purchaser questionnaires, pre– and post-hearing submissions by the parties, and testimony at the public hearing. Based thereon, the first group of commissioners, Chairman Newquist *et al.*, concluded that cutting tools for professionals are

> designed to withstand harsher treatment, perform under more extreme conditions, and operate more or less continuously. Thus, [they] are designed to be more durable than their consumer counterparts. To this end, professional tools are generally heavier in weight, housed in heavier-gauge steel or compound materials, powered by higher amperage and more overload-tolerant motors, have heavier and more wear-resistant bearings, and are fixed with a thicker-jacketed power cord of special rubber to resist abrasion and retain flexibility during cold weather. The professional/industrial tool is also assembled from different components than the consumer tool.

Pub. 2658, pp. 12–13 (footnotes omitted). The second group, as recited above, found a "continuum of cutting tools" and thus one like product which includes all of them. *Id.* at 51.

The plaintiffs claim that the latter group, Vice-Chairman Watson *et al.*, "took the correct approach", whereas that of the first "was arbitrary and unsupported by substantial evidence in the record." Plaintiffs' Brief [ITC], p. 20. Among other things, they argue that there is no industry basis for classifying electric cutting tools as professional due to physical characteristics, that there is no clear line dividing such tools for professionals as opposed to consumers, and that the physical characteristics relied on by the first group for corded and cordless tools are illogical and baseless.

---

[24] S.Rep. No. 249, 96th Cong., 1st Sess. 90–91 (1979).

Opposing counsel concede that the "Commission looks for clear dividing lines among products like and most similar to the subject imports"[25], but they also confirm that

> the Commission's role is to accept Commerce's scope determination and then to determine what domestic product is like the imported articles identified by Commerce.

Defendant ITC Memorandum, p. 30. In doing so, it is contended that Chairman Newquist and Commissioners Rohr and Nuzum "explicitly did not evaluate physical characteristics of professional and consumer electric cutting tools on the criteria established in Commerce's definition of the imported tools, a fact that Plaintiffs repeatedly ignore."[26]

The record supports this contention. It shows with regard to the physical characteristics recited by them and quoted above that they found, among other things, the motors of professional tools constructed in such a manner as to reduce heat and thereby extend operating life; the power transmission parts heat-treated for increased strength, durability and resistance to wear; the gearing and the bearings more durable than those in consumer tools; and the power cords on professional tools with rubber jackets and separate protectors. Hence, the record contains testimony to the effect that a professional circular saw is designed to perform 500 hours as compared with 150 for a consumer model. *See* ITC R.Doc 43, p. 21.

The view of the first group of commissioners is that the extent of actual differences "varies from one tool type to another"[27] but that, whatever the degree of interchangeability among them, it appears to be in the direction of professional tools. *See* Pub. 2658, pp. 14–15. They base this finding primarily on a report in the record by the Caney Research Group entitled *The 1991 Professional Power Tool Brand Image and Purchase Tracking Study* that, while 25 percent of the tradesmen had purchased tools arguably made for consumers, only nine percent of those surveyed would purchase such a tool again for a professional job.[28]

Chairman Newquist *et al.* conclude that the "distinction between professional and consumer tools is widely accepted in the industry." *Id.* at 15. They cite for support the staff report, *id.* at I–5, which concedes, however, that "actual differences vary from one tool type to another." While Makita denies the existence of such distinction, at least in regard to its own products, the first group of commissioners focuses on the fact that warranties and safety certifications generally differ for professional and consumer tools produced by Black & Decker, if not by others. *See id.* at 15. Moreover, catalogues from a number of manufacturers indicate that certain types of cutting tools are indeed specifically designed

---

[25] Defendant ITC Memorandum, p. 32.

[26] *Id.* at 36.

[27] Pub. 2658, p. 13.

[28] *See* ITC R.Doc 45, Exhibit 22, pp. 144–45. *But compare* Pub. 2658, p. 14 n. 32 ("In the final investigation, Makita estimated that 'between 60 and 65 percent of its tools are currently purchased by do-it-yourselfers' based on Makita's warranty returns and marketing studies").

for professional or industrial use. *See, e.g.*, Brief of Defendant-Intervenor [ITC], Appendix 11.

Whatever the perceptions of producers or purchasers, all of the ITC members recognize a similarity of the channels of distribution of the tools. *Compare* Pub. 2658, p. 16 *with id.* at 60. With regard to production processes, the second group, Vice-Chairman Watson *et al.*, points to several similar steps in manufacturing professional and consumer versions. *See id.* at 61. The first group of commissioners refers to similarities in production as well but also states that the

> major components of professional and consumer tools are produced differently. Steel parts for professional tools are heat-treated * * * to provide more strength and durability than their consumer counterparts. The motors for professional tools are manufactured with more sophisticated procedures and parts for extra durability. In general, parts and components for professional tools are manufactured using a greater number of production steps, higher quality raw materials, *i.e.*, alloy v. low carbon steel, and are designed to meet higher tolerances than parts and components for consumer tools.

Id. at 17 (footnotes omitted).

As for the final factor, price, Chairman Newquist *et al.* conclude that for professional tools may be several times the price of corresponding consumer/home-use tools at the retail level[29], whereas the other group of commissioners characterizes the differences as "continua". *Id.* at 62.

As indicated above, the plaintiffs only contest the first group's like-product analysis as not based on substantial evidence. The court cannot concur, given the record developed and the judicial definition of such evidence, *supra*. Moreover, since "it is not the province of the court[ ] to change the priority of the relevant like product factors or to reweigh or judge the credibility of conflicting evidence"[30], suffice it to state in passing that there is also substantial evidence on the record in support of the like-product analysis of the other group of commissioners.

B

The plaintiffs argue that, even if the two like-product definitions are accepted,

> the conclusion of Commissioners Newquist, Rohr and Nuzum that the industry had suffered material injury by reason of imports was unsupported by substantial record evidence. In addition, though Commissioners Watson, Brunsdale and Crawford correctly defined the "like product," and again assuming *arguendo* that the domestic industry was not healthy, their conclusion that any injury to such a domestic industry was due to the subject imports is without basis in the record. * * *
>
> The ITC staff failed to obtain pricing information adequate for purposes of making *either* injury determination, which is adequate

[29] Pub. 2658, p. 18.

[30] *Chung Ling Co. v. United States*, 16 CIT 636, 648, 805 F. Supp. 45, 55 (1992).

> grounds to require a remand by itself. In the first place, its data gathering was based on a definition of the "like product" that had no basis and ultimately was itself superseded. The ITC staff essentially determined *prior* to instituting its information-gathering effort that it would only seek that information which supported its assumptions and misperceptions regarding the industry.

Plaintiffs' Brief [ITC], pp. 70–71 (emphasis in original, citations omitted).

Subsection A of 19 U.S.C. §1677(7) (1993) defined material injury as "harm which is not inconsequential, immaterial, or unimportant". In making determinations in regard to such injury, subsection B stated that the ITC (i) must consider

> (**I**) the volume of imports of the merchandise which is the subject of the investigation,
> (**II**) the effect of imports of that merchandise on prices in the United States for like products, and
> (**III**) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States; and

(ii) may consider

> such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports[,]

while subsection C provided as follows for evaluation of relevant factors for purposes of B, including:

> **(i) Volume**
> In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.
>
> **(ii) Price**
> In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—
>
> > (**I**) there has been significant price underselling by the imported merchandise as compared with the price of like products of the United States, and
> > (**II**) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.
>
> **(iii) Impact on affected domestic industry**
> In examining the impact required to be considered under subparagraph (B)(iii), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to—
>
> > (**I**) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,

> (**II**) factors affecting domestic prices,
> (**III**) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and
> (**IV**) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.
>
> The Commission shall evaluate all relevant factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.

It has been held that these factors need not all be one way for an affirmative finding of material injury. *See, e.g., Iwatsu Electric Co. v. United States*, 15 CIT 44, 49, 758 F.Supp. 1506, 1510 (1991). *Cf. Saarstahl AG v. United States*, 18 CIT 595, 599–600, 858 F.Supp. 196, 200 (1994). Indeed, it has long been stated in the legislative history of the statute that the

> significance of the various factors affecting an industry will depend upon the facts of each particular case. Neither the presence nor the absence of any factor * * * can necessarily give decisive guidance with respect to whether an industry is materially injured, and the significance to be assigned to a particular factor is for the ITC to decide.

S. Rep. No. 249, 96th Cong., 1st Sess. 88 (1979).

(1)

The plaintiffs refer to "numerous positive factors demonstrating the health of the domestic electric cutting tool industry"[31], which, according to them, the ITC either "glossed over"[32] or failed to properly consider[33]. But the commissioners do not appear to have disregarded "certain positive factors, such as production, shipments and net sales", to quote from the views of the first group, Pub. 2658, p. 25. Rather, other, negative factors were found to be of greater moment. For example, operating income and PECTs net income both declined substantially over the period of investigation. *See, e.g., id.* at 27, 66. Capacity utilization rates were found to be low[34], and year-end inventories of PECTs were large. *See, e.g., id.* at 26. Moreover, while, as indicated, shipments of domestic PECTs increased, the rate thereof was less than that for U.S. consumption of such goods. *See, e.g., id.*

The plaintiffs also claim that other economic factors like a "tarnished image" of Black & Decker and a downturn in new-home construction, rather than imports, adversely affected the health of the domestic industry. *See* Plaintiffs' Brief [ITC], pp. 64–67. The Commission, however, is required to consider an industry as a whole, not necessarily the plight of an individual constituent thereof. *See generally* 19 U.S.C. §1677(4).

---

[31] Plaintiffs' Brief [ITC], p. 69.
[32] *Id.* at 61.
[33] *Id.* at 69.
[34] *See, e.g.*, Pub. 2658, pp. 26, 65.

And, while it may consider "other economic factors" per 19 U.S.C. §1677(7)(B)(ii), *supra*, the primary obligation is examination of the factors set forth in subpart (i), as elucidated by subsection (C).

(2)

As for those considerations, the plaintiffs do not contest the finding that increases in "the volume of imports of the merchandise" were "significant" within the meaning of 19 U.S.C. §1677(7)(B)(i)(I) and (C)(i).[35] Rather, they dwell upon the ITC staff's method of collecting and using the volume and also the pricing data, as well as the Commission's interpretation thereof. They argue that (a) the staff questionnaires and pricing data were inaccurate by not reflecting the ITA's final definition of imports of PECTs found sold at less than fair value; (b) the staff collected detailed pricing data on too small a percentage of tools; (c) it did not collect information on PECTs imported from non-subject countries; and (d) the staff failed to consider price/quality tiers in which the imports and domestic products competed.

In challenges to ITC investigative thoroughness, cases have been remanded only for failure to seek critical information. *See, e.g., Hannibal Industries, Inc. v. United States*, 13 CIT 202, 207, 710 F.Supp. 332, 336 (1989), citing *USX Corp. v. United States*, 11 CIT 82, 655 F.Supp. 487 (1987); *Budd Co. Ry. Div. v. United States*, 1 CIT 67, 507 F.Supp. 997 (1980). As long as the methodology and procedures are a "reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed.Cir. 1987).

(a)

The plaintiffs argue that the Commission never adjusted the data to reflect the ITA's ultimate PECTs definition and later failed to seek pricing data for all cutting tools, not just professional models. In conducting investigations, however, the "ITC is not required to amass every conceivable shred of relevant data in order to comply with the requirements of the law". *USX Corp. v. United States*, 11 CIT at 95, 655 F.Supp. at 498. Upon review of the records developed, the court does not find that the ITA's definition substantially affected the Commission's data since the

---

[35] Chairman Newquist *et al.* determined that

> LTFV imports of PEC tools from Japan, and U.S. shipments of those imports, increased significantly, both in terms of quantity and value over the period of investigation. * * * The large volume of subject imports as well as the significant and increasing share of domestic consumption accounted for by the U.S. shipments of LTFV imports of PEC tools from Japan are important factors in our affirmative determination.

Id. at 32 (footnote omitted). The second group of commissioners reached a similar conclusion. *See id.* at 68–69.

Although the plaintiffs do not dispute the finding(s) of increased volume, they claim that this is essentially the only factor tending to support the material-injury determination. *See* Plaintiffs' Brief [ITC], pp. 79, 82.

adjustment had impact on only a small percentage of the subject imports.[36] Furthermore, the defendants claim that,

> [i]mmediately after Commerce's final determination was issued * * *, the Commission requested * * * that all producers and importers of PEC and CEC tools provide revised data which would permit [it] to assess evidence that conformed with Commerce's final determination.

Defendant ITC Memorandum, p. 47.

(b)

The plaintiffs argue that the ITC staff compiled pricing data for too few tools, but the record reveals that the staff gathered data for a representative sample composed of three types of professional tools (circular, jig and reciprocating saws) and one kind of consumer tool, circular saws. Since several different models are in each category, the Commission requested that domestic and foreign producers give the model numbers for the comparable products in each. The staff compiled the pricing data received, including that provided by Makita.

The court does not conclude that this was inadequate, in particular in view of the products for which price data were requested, to wit:

> *Product 1*: Reciprocating Saw: Approximately 4 to 6.5 amps, variable speed, 2,300 to 2,400 strokes per minute.
> *Product 2*: Circular Saw: Approximately 13 amps, 5,200 to 5,800 rpm, 7.25 inch blade.
> * * * * * * *
> *Product 5*: Jig Saw: Super duty 3.5 to 4.5 amps, orbital cut, speed 0–3,100 strokes per minute.
> *Product 6*: Circular Saw: Approximately 10 amps, 2 to 2-1/8 horsepower motor, 7.25" blade, 4,600 to 5,300 rpm.

Pub. 2658, p. I–37. There is little indication that the Commission sought to rely on unrepresentative models or that the pricing data received were not representative. *Cf. Wieland Werke v. United States*, 13 CIT 561, 574, 718 F.Supp. 50, 60 (1989).

(c)

The plaintiffs claim that the ITC "never sought data as to non-subject imports from other countries" and that the data obtained did not distinguish professional from other tools. Plaintiffs' Brief [ITC], p. 72. However, as long as their "imports contribute, even minimally, to the conditions of the domestic industry, * * * the Commission is precluded from weighing the causes of injury" by others. *Citrosuco Paulista, S.A. v. United States*, 12 CIT at 1228, 704 F.Supp. at 1101, quoting *British Steel Corp. v. United States*, 8 CIT 86, 96, 593 F.Supp. 405, 413 (1984). Moreover, non-subject imports of electric cutting tools from other countries are referenced. *See* Pub. 2658, pp. I–31 to I–33. In short, plaintiffs' objec-

[36] Only one Makita model was directly affected. The plaintiffs counter that the ITC assumes that other purchasers did not report sales data which included this model. Plaintiffs' Reply Brief [ITC], p. 56. And if that data had been reported, "this would have overstated the volume of imports." *Id.*

tion to the lack of non-subject-import information does not appear well-founded.

(d)

The plaintiffs claim that the models identified by the Commission are "fatally flawed" due to the failure to take into account the price/quality tiers in which they compete, "thereby unfairly highlight[ing] the lower prices of the imports, and mask[ing] the natural medium price levels at which the * * * imports did compete with domestic producers". Complaint [ITC], para. 24(f). *See also id.*, para. 24(r); Plaintiffs' Reply Brief [ITC], pp. 59–60. That is, Makita argues that the electric-cutting-tool industry should be divided into premium, moderate and lower price/quality tiers, with its tools found at the moderate level. The plaintiffs refer to observations of Vice-Chairman Watson *et al.* that "imports of PEC and PES tools from Japan tend to be positioned at the moderate or middle range of prices"[37] and that "Japanese imports have occupied a mid-level position on the price-quality spectrum of EC tools, competing in all market segments." Pub. 2658, p. 70.

The ITC can apply a segmented-market analysis "in reaction to varying levels of customer demand, rather than to adjust for physical differences in the products themselves." *Acciai Speciali Terni, S.p.A. v. United States*, 19 CIT ____, ____, 1995 WL 476719, at *11 (Aug. 7, 1995). But neither the statute nor its legislative history requires the Commission to adopt a particular analysis when the market has segments. *Id.* And the court notes in passing that an argument similar to plaintiffs' was raised in *Encon Industries, Inc. v. United States*, 16 CIT 840 (1992), in which the plaintiff had sought to distinguish between "low-end" and "high-end" ceiling fans on a market-segment basis. It argued that the products at each end were so different that imports which competed directly with low-end fans could not possibly affect high-end producers. The court did not accept the argument, referring to it as "a back-door way of saying that the 'like product' determination * * * is wrong." *Id.* at 842.

(3)

The plaintiffs are of the view that injurious pricing is the

> single most significant factor in an injury determination in anti-dumping cases. Commissioners Newquist, Rohr and Nuzum found mixed pricing (*i.e.*, overselling as well as underselling) in both their analysis of the "professional" electric cutting industry and the "professional" sanding/grinding industry. * * * By accepting mixed underselling by imports as non-injurious in the "professional" sanding/grinding tool industry, it is hard to see how they could view pricing in the "professional" electric cutting tool industry any differently. If, in fact, the experience of the "professional" sanding/grinding tool industry is to serve as a benchmark, as this group of Commissioners suggested it should * * *, then they should have

[37] Pub. 2658, p. 62.

rendered a negative injury determination with respect to imports of "professional" electric cutting tools.[38]

But the Commission "need not find a consistent pattern of underselling to make an affirmative determination", only that the "mixed trends are adequate to establish causation." *Holmes Products Corp. v. United States*, 16 CIT 1101, 1104 (1992), citing *Florex v. United States*, 13 CIT 28, 40, 705 F.Supp. 582, 593 (1989). Here, the data for sales of reciprocating saws to retailers reflect underselling only, as does that for jig saws every quarter but one. With regard to circular saws, a mixed pattern of underselling and overselling was found to exist. *See, e.g.*, Pub. 2658, pp. 34–35. Chairman Newquist *et al.* consider this "significant price undercutting by the imported merchandise" within the meaning of 19 U.S.C. §1677(7)(C)(ii)(I), and this court cannot hold otherwise on the record presented.

The plaintiffs also claim that this group never verified evidence of lost domestic sales. While the record indicates that business is not conducted on an open-bid basis, several instances of lost sales and lost revenues are in fact presented. *See* Pub. 2658, pp. I–43 to I–45. The record shows that Makita granted discounts on cutting tools in the last quarter of 1992 which, in one instance, were "$15 to $20 less than Makita's usual price." *Id.* at I–44. In another cited example, the purchaser placed an order for a "one-year supply of merchandise" due to Makita's price reduction. *Id.*

Although lost-sales and lost-revenue evidence may be anecdotal, it is of some moment, in the context of corroboration. *See, e.g., Iwatsu Electric Co. v. United States*, 15 CIT at 53 and 758 F.Supp. at 1514 n. 15. Such evidence confirms what is indicated by decreasing demand, rising shipments of imports and underselling by them. *Lone Star Steel Co. v. United States*, 10 CIT 731, 733–34, 650 F.Supp. 183, 186 (1986).

Despite plaintiffs' contentions regarding lost-sales data, the evidence thereof on the record, along with that of price suppression and underselling in conjunction with the increased volume of imports, support the affirmative determination of Chairman Newquist *et al.* Indeed, no specific type of lost sales is required[39], and "[w]here fungible goods are concerned, volume may be the best indicator of lost sales rather than the anecdotal evidence obtained in the typical lost sales study." *Gifford Hill Cement Co. v. United States*, 9 CIT 356, 368, 615 F.Supp. 577, 586 (1985). *See, e.g., Granges Metallverken AB v. United States*, 13 CIT 471, 481, 716 F.Supp. 17, 26 (1989). Given the record developed and the fungibility of PECTs[40], the court concludes that the affirmative determination by

---

[38] Plaintiffs' Brief [ITC], pp. 78–79 (citations omitted). The commissioners named compared both kinds of tools since they share similar market conditions, price sensitivities and showed similar increases in net sales, shipments and production. *See* Pub. 2658, p. 36. While the pricing data for both kinds revealed some mixed trends, only the effects on PECTs were found to be significant by this group of commissioners.

[39] *See, e.g., Czestochowa v. United States*, 19 CIT ___, ___, 890 F.Supp. 1053, 1076 (1995) ("the ITC is not statutorily required to use a particular methodology to review lost sales * * * or * * * lost revenue" but has the "discretion to pursue investigations which * * * yield substantial evidence to support its determinations").

[40] *See, e.g.*, Pub. 2658, p. 33 ("the subject imports are very good substitutes for the domestically produced PEC tools").

those commissioners of material injury caused by the PECTs imports to the domestic industry is in accordance with law.

(4)

The defendants state that the second group of commissioners

> could only make price comparisons between imports subject to investigation and the like product. Since the like product composed of all EC tools included lower priced articles as to which no subject import corresponds, these Commissioners who defined the like product as all EC tools could not conduct price comparisons on those articles.

Defendant ITC Memorandum, p. 84. Hence, this group based its affirmative determination on such factors as the "substitutability between subject imports and the domestic like product, the availability of substitute products in the market, and the dumping margin". Pub. 2658, pp. 69–70. But it also considered price suppression unlikely as a result of this substitutability.[41]

However, the ITC "must assess causation", nothwithstanding difficulty or even impossibility of direct price comparison. *E.g.*, *Iwatsu Electric Co. v. United States*, 15 CIT at 54, 758 F.Supp. at 1515. Moreover, the record is not clear enough that the non-pricing factors are so significant as to enable these commissioners to forgo any meaningful consideration of underselling and lost sales. *See*, *e.g.*, *R-M Industries, Inc. v. United States*, 18 CIT 219, 227–28, 848 F.Supp. 204, 211 (1994). Indeed, "[s]ales lost due to underpricing is an important test of injury in the case of fungible goods." *Gifford Hill Cement Co. v. United States*, 9 CIT at 368, 615 F.Supp. at 586. Absent such consideration on the record, the court cannot and therefore does not sustain their determination.

(5)

Be that as it may, the plaintiffs are not entitled to relief since the affirmative determination of Chairman Newquist and Commissioners Rohr and Nuzum is supported by substantial evidence on the record and otherwise in accordance with law, which, among other things as shown above, provides for such a determination when at least half of the commissioners vote therefor.

IV

To the extent other matters raised in plaintiffs' thorough papers have not been specifically addressed, the court has concluded that they do not warrant any discussion like the foregoing, which requires that plaintiffs' motions for judgments on the agency records be denied and these actions dismissed.

---

[41] *See* Pub. 2658, p. 71. Including pricing data for a domestic circular saw at the low range of the "continuum", Vice Chairman Watson did note periods of underselling. *See id.* at 71–72, n. 98. The other two commissioners commented that "evidence of underselling is not very probative in cases, like this one, where one cannot simply assume that non-price factors distinguishing the dumped from the domestic product are trivial." *Id.* at 72, n. 99.

(Slip Op. 97–93)

IKO INDUSTRIES LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–06–00451

(Dated July 8, 1997)

JUDGMENT

CARMEN, *Judge:* The subject action is before the Court on an order from the United States Court of Appeals for the Federal Circuit ("CAFC") affirming in part and vacating in part this Court's decision. *IKO Industries Ltd. v. United States*, ____ Fed. Cir. ____, C.A. 96–1111 (1997). On appeal, the plaintiff abandoned its claim as to Armour Lock shingles and the CAFC vacated that portion of this Court's decision relating to Armour Lock shingles, while affirming the remainder as to all other paper-based asphalt shingles and roll roofing before it. The CAFC's mandate having been issued on January 22, 1997, it is hereby:

1. ORDERED that this Court's Judgment Order of September 19, 1995, granting plaintiff's motion for summary judgment with respect to the classification of the subject merchandise identified as Armour Lock shingles is vacated; and it is further

2. ORDERED that the classification of Armour Lock shingles by the United States Customs Service under subheading 6807.90.00, HTSUS, is affirmed; and it is further

3. ORDERED that the classification of paper-based asphalt roll roofing products described on the invoices as smooth surface, mineral surface, and selvage, with or without other words of description, and paper-based asphalt shingles described on the invoices as Aristocrat, AM Armour Seal 20, Chateau, New Englanders, Total Seal, Armour Seal Supreme, Economy Seal, Supreme and Super Seal, with or without other words of description by the United States Customs Service under subheadings 6807.10.00 and 6807.90.00, HTSUS, is reversed; and it is further

4. ORDERED that the United States Customs Service shall reliquidate the entries which involve the paper-based asphalt roll roofing products described on the invoices as smooth surface, mineral surface, and selvage, with or without other words of description, and the paper-based asphalt shingles described on the invoices as Aristocrat, AM Armour Seal 20, Chateau, New Englanders, Total Seal, Armour Seal Supreme, Economy Seal, Supreme and Super Seal, with or without other words of description, and shall refund all excess duties with interest as provided by law, and it is further

5. ORDERED that the entries which do not involve the merchandise which is described in paragraph 4 and thereby subject to reliquidation under subheading 4811.10.00, HTSUS, pursuant to this Judgment, will not be reliquidated or will be reliquidated as entered.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C97/63 7/9/97 Watson, J.	Mattel, Inc.	92-08-00545	9503.90.60 6.8%	A9503.90.70205 Duty free	Mattel, Inc. *v.* United States Slip Op. 96-194 December 13, 1996	San Diego Doll-sized cars
C97/64 7/10/97 Carman, J.	Commercial Aluminum Cookware Co.	94-09-00523	7013.39.10 12.5%	7010.90.20 3.7% if imported in 1994 or 3.5% if imported in 1995 7010.20.20 3.2% if imported in 1996	Commercial Aluminum Cookware Company *v.* United States, CIT Court No. 94-01-00071 Slip Op. 96-135 (August 13, 1996); 938 F. Supp. 875	Chicago Unfinished tempered glass lids with stainless steel rims attached
C97/65 7/10/97 Carman, J.	Commercial Aluminum Cookware Co.	96-09-02132	7013.39.10 12.5%	7010.90.20 3.7% if imported in 1994 or 3.5% if imported in 1995 7010.20.20 3.2% if imported in 1996	Commercial Aluminum Cookware Company *v.* United States, CIT Court No. 94-01-00071 Slip Op. 96-135 (August 13, 1996); 938 F. Supp. 875	Chicago Unfinished tempered glass lids with stainless steel rims attached

Index

Customs Bulletin and Decisions
Vol. 31, No. 31, July 30, 1997

U.S. Customs Service

General Notices

CUSTOMS RULINGS LETTERS

U.S. Court of International Trade

Slip Opinions

Abstracted Decisions

Federal Recycling Program
Printed on Recycled Paper
U.S. G.P.O. 1997–417–405–40044